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Subject New comment on REG 2014-05 submitted by Farris, Michael

3 attachments



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October 30, 2014

Mr. Adav Noti Acting Associate General Counsel Federal Election Commission 999 E Street NW Washington, DC 20463

Re: Response to Petition for Rulemaking to Amend 11 C.F.R. § 100.4

Dear Mr. Noti,

On behalf of The Convention of States Project, ¹ I hereby request that the FEC dismiss the Petition for Rulemaking to amend 11 C.F.R. § 100.4, which was published in Notice 2014-09. The Petition's requested amendment is beyond the scope of the FEC's statutory authority and rests upon a fundamentally flawed understanding of the role of delegates to a convention under Article V of the United States Constitution.

I. THE FEC LACKS AUTHORITY TO EXTEND THE DEFINITION OF "FEDERAL OFFICE" TO COVER DELEGATES TO AN ARTICLE V CONVENTION.

The definition of "federal office" set forth in 11 C.F.R. § 100.4, which the Petitioner seeks to amend, is a mere restatement of the definition established by Congress in 2 U.S.C. § 431(3). The FEC, which acts according to a congressional delegation of power, has no authority to alter this definition.

As the Supreme Court has explained, the first consideration for evaluating the legality of any administrative agency action is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Further, an administrative agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal quotations omitted).

¹ The Convention of States Project is a nationwide, grassroots initiative of Citizens for Self-Governance, advocating for an Article V Convention to limit the power of the federal government.

The FEC was formed by Congress to administer the Federal Election Campaign Act (FECA). As part of this initial legislation, Congress defined the term "federal office," and its definition does not include delegates to an Article V convention (for good reasons that will be discussed below). *See* 2 U.S.C. § 431(3). The administrative structure established by Congress does not give the FEC authority to regulate Article V convention delegates, and it certainly does not give the FEC authority to rewrite the very legislation that created it and sets the scope of its authority.

Congress's decision not to include convention delegates in the definition of federal office is the end of the matter. Petitioner's request that the FEC broaden or otherwise amend this definition is nothing more than a request for the FEC to perform an *ultra vires* agency action. If Petitioner seeks to expand the scope of authority granted by FECA, the proper avenue is congressional legislation, not agency action. Though, as demonstrated below, even Congress itself does not have constitutional authority to control or regulate Article V convention delegates.

II. THE FEDERAL GOVERNMENT'S ASSERTION OF AUTHORITY OVER ARTICLE V CONVENTION DELEGATES WOULD BE UNCONSTITUTIONAL IN LIGHT OF THE HISTORICAL PRACTICE UNDERPINNING ARTICLE V.

Contrary to Petitioner's claim that there is a "clear requirement of election" for delegates, the text of Article V is silent with regard to how delegates are selected and controlled. The silence of Article V, however, does not give Congress, or the FEC, unbridled discretion to act. According to the Supreme Court, where the text of Article V is silent, historical practice controls. *See, e.g.*, *Hollingsworth*, 3 U.S. 381 (looking to historical practice to determine whether the Eleventh Amendment had been properly adopted); *Leser*, 258 U.S. 130 (same with the Nineteenth Amendment). Historical practice overwhelmingly indicates that Article V convention delegates are appointed and controlled by the state legislatures, not Congress or federal agencies.

A. Historical Practice Indicates That State Legislatures, Not Congress, Possess Authority to Appoint and Regulate Convention Delegates.

In the century leading up to American independence in 1776, there were at least twenty multistate conventions. Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments*," 65 Fla. L. Rev. 615, 620 (2013). In the decade between the Declaration of Independence in 1776 and the Constitutional Convention in 1787, there were ten more. *Id.*

Procedures at these conventions were remarkably uniform, particularly when it came to the appointment and instruction of delegates. *See generally id.* Delegates were not popularly elected, nor

were they appointed by Congress or another super-colonial body. At these conventions "the nearly-universal procedure was for the state legislatures to determine the method of selecting commissioners [i.e. delegates]. (Exceptions were limited to instances when the selection had to be made during legislative recess)." Robert G. Natelson, *A Compendium for Lawyers and Legislative Drafters* 48 (2d ed. 2014). *See generally* Natelson, *Conventions, supra*. This practice continued at the numerous multistate conventions held after the adoption of the Constitution as well. Natelson, *Compendium, supra*, at 48-49. The state legislatures could, and sometimes did, confer the selection of delegates on another state entity, such as the governor or a special committee, Natelson, *Compendium, supra* at 48-49, but ultimate authority over the delegates always rested with the state legislatures. Thus, while the people are certainly represented in the Article V process, it is only in a corporate or indirect sense, through either Congress or the state legislatures. *See Dodge v. Woolsey*, 59 U.S. 331, 348 (1856).

State appointment of convention delegates also carries certain implications for proceedings at the convention itself. For instance, as representatives of the state legislatures, delegates have always conducted business on a one-state, one-vote basis. Natelson, *Compendium*, *supra*, at 63-64; *see also* Natelson, *Conventions*, *supra*, at 666. Also, in order to verify their authority to participate in the convention, delegates were required to display commissions issued by their respective state legislatures. *E.g.*, *id.* at 631, 636, 638, 658, 663, 679, 687.

Hence, from the days of its earliest operation, the state-driven nature of Article V has been reflected by an appropriate vocabulary. The first ever state application under Article V applied for a "convention of the states." *See*, *e.g.*, 1 Annals of Cong. 258-59 (J. Gales ed. 1834) (H.R., May 5, 1789) (reproducing the text of the first filed Article V application from the state of Virginia). Subsequent state applications used similar language. *See*, *e.g.*, H.R. Journal, 1st Cong., 1st Sess. 29-30 (May 6, 1789). Even the Supreme itself has called an Article V convention "a convention of the states." *Smith v. Union Bank*, 30 U.S. 518, 528 (1831).

The conclusion of all of this is that historical practice dictates that the state legislatures appoint and control delegates to an Article V convention, not Congress or federal agencies. Given the silence of the text, and the reliance of the Supreme Court on historical practice when interpreting the procedures of Article V, any attempt by Congress to assume or delegate authority over convention delegates would almost certainly be struck down as unconstitutional.

B. An Article V Convention Was Intended to Be a State-Driven Process that Could Bypass Congress.

The text and structure of Article V flow from this history. Though Article V is silent with regard to the appointment and regulation of delegates, the text makes it clear that the convention process, unlike

Federal Election Commission Response to Petition to Amend 11 C.F.R. § 100.4 Page 4

the congressional method of amendment, is state-driven: when two-thirds of the states apply, Congress "shall call a convention." As Alexander Hamilton indicated in *Federalist No. 85*, "The words of this article are peremptory. The Congress 'shall call a convention.' Nothing in this particular is left to discretion." Purely from the structure of the text, it appears that Congress and the states were each intended to have their own method of proposing amendments. Indeed, James Madison said as much in *Federalist No. 43* ("[The Constitution] equally enables the general and state governments, to originate the amendment of errors").

This reading of Article V is further bolstered by discussions held at the drafting convention. James Madison's notes from the Constitutional Convention give a full account of the proceedings leading to the final draft of Article V. 2 *The Records of the Federal Convention of 1787*, at 629-30 (Max Farrand ed. 1911). According to these notes, George Mason strenuously objected to a proposal that only gave Congress authority to propose amendments. As Madison records:

Col. Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.

Id. Responding to Mason's concerns, Gouverneur Morris and Elbridge Gerry "moved to amend the article, so as to require a convention on application of two thirds of the states." *Id.* The motion passed unanimously. *Id.* at 630.

Article V was intended to give both Congress and the states a means of proposing amendments. It is therefore appropriate that the states, rather than the federal government, should control the convention process. Congress thus properly excluded convention delegates from the definition of "federal official" in 2 U.S.C. § 431(3). To have done otherwise, would have been unconstitutional in light of the intent, structure, and text of Article V.

C. Contrary to the Petitioner's Suggestion, the States Are Completely Equipped to Trigger an Article V Convention.

Petitioner asserts that "The ambiguity in the term 'federal office' is retarding the states from promulgating appropriate enabling statutes" and that "without enabling statutes, the States lack the capacity to carry the Convention into execution." But it is very clear from the text of Article V that Congress is constitutionally obligated to call a convention upon receiving applications from two-thirds of the states, currently thirty-four. There is no constitutional prerequisite for states to have delegate

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selection rules in place before they apply for a convention nor before Congress fulfills its mandatory duty to call the convention, once triggered.

Petitioner also reaches the odd conclusion that Congress has never called a convention on the 400 past convention applications because of the absence of enabling legislation on the part of the states. The much more plausible, and constitutional, explanation of Congress's inaction is that two-thirds of the states have never applied for a convention on the same topic. The idea that Congress can only aggregate those applications that are on the same subject flows from common sense, established history, *see* Natelson, *Conventions, supra*, and existing scholarship. *See, e.g.*, Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 Const. Comm. 53 (2012) (arguing a convention can be thus limited).

Moreover, the states are clearly not dependent on Congress or the FEC to trigger the Article V process or enact enabling legislation, as evidenced by the fact that most states are actively putting in place legislation to facilitate an Article V convention. Over a hundred state legislators representing thirty-three states meet together semiannually at The Assembly of State Legislatures to put just these sorts of rules in place. *See The Assembly of State Legislatures*, http://theassemblyofstatelegislatures.org/ (last visited Oct. 29, 2014). Contrary to the Petitioner's assertion, the reason an Article V convention has never been held is because thirty-four states have never applied for a convention on the same topic; it is certainly not because the states are waiting for the FEC to broaden the definition of "Federal Office."

III. STATE LAWS PRESCRIBING APPOINTMENT OF ARTICLE V CONVENTION DELEGATES DO NOT VIOLATE FEDERAL CRIMINAL LAW.

Petitioner's assertion that statutes prescribing modes of delegate selection other than popular election violate 18 U.S.C. § 601 is far-fetched and cannot be seriously maintained. In addition to the fact that this reading of the statute flies in the face of existing Supreme Court precedent, *Dodge*, 59 U.S. at 348, it is also patently implausible based on the language used in the statute.

Conclusion

The Petition to amend 11 C.F.R. § 100.4 should be dismissed without further action, because the FEC lacks authority to broaden the definition of "federal office" established by Congress, and because even if the FEC had authority to do so, the amendment requested by the petitioner is unconstitutional in light of historic practice and Supreme Court precedent.

Federal Election Commission Response to Petition to Amend 11 C.F.R. § 100.4 Page 6

Please feel free to contact my office at (540) 441-7227 if you have further questions about this matter.

Sincerely,

Michael Farris, J.D., LL.M.
Director, Convention of States Project
Member of the Bars of the District of Columbia and Washington State

Rita Dunaway, J.D. Staff Counsel, Convention of States Project Member of the Virginia Bar

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CONVENTION OF STATES

CONVENTION OF STATES. COM

A COMPENDIUM FOR LAWYERS AND LEGISLATIVE DRAFTERS

ROBERT G. NATELSON



State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters

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Foreword by Michael Farris

This Compendium is written by the nation's foremost scholar on Article V, Professor Robert G. Natelson. It is designed to assist both legislators and legislative counsel with the legal issues most likely to arise in the process of calling for a Convention of the States under Article V.

Mark Levin's book, *The Liberty Amendments*, has focused a great deal of attention on the possibility of using Article V to rein in the growth of federal power. Many different proposals are being advanced by a variety of organizations. This Compendium should serve as a valuable tool to assist with the legal analysis of all of these different Article V proposals.

In general terms, supporters of Article V advocate three basic approaches. Some proposals call for a single amendment (e.g., a Balanced Budget Amendment). Some proposals call for an unlimited convention. We propose a convention for a single topic, rather than a single amendment.

The approach being advanced by Citizens for Self-Government is essentially identical to the one advanced by Mark Levin. We seek a Convention of States that is limited to restraining the power and jurisdiction of the federal government and imposing fiscal restraints on Washington, D.C. Our proposal would also permit consideration of term limits on members of Congress, the judiciary, and other federal officials.

When state applications approach the same general subject, but differ in the operative language, it opens up the prospect of legal challenges when trying to determine whether thirty-four applications have been passed on the same subject. The Convention of States Project seeks to ensure that thirty-four states enact the exact same language in the operative sections. Language in preambles and introductory paragraphs can vary, but we are in the best possible legal situation when the formal resolution stating the purpose for the convention is uniform in all states.

The Bill of Rights was a package of amendments designed to preserve the rights of the people. Our Convention of States Project will allow the states to

propose a package of amendments designed to limit the growth and curb the fiscal irresponsibility of the federal government. Other solutions have good attributes. But our solution is the only approach that offers a solution that is as big as the problem. We need a comprehensive solution to the mess in Washington, D.C.

We invite your careful consideration to the Convention of the States model. But, again, this Compendium should be of value in assessing all Article V proposals. Thank you for your service to your state and our nation.

Michael P. Farris

Executive Summary

Article V of the United States Constitution prescribes methods of amending the instrument. It tells us that all amendments must be ratified by legislatures or conventions in three fourths of the states—but that before they can be ratified, they must be duly proposed.

The Constitution provides for two modes of proposal: by Congress and by a "Convention for proposing Amendments." A convention must be called by Congress on "application" of two-thirds of the states.

Because a convention for proposing amendments has never been held, some commentators believe little is known about it or about the procedures leading to it. As a matter of fact, quite the contrary is true: We know a great deal about those subjects.

Our sources include convention practice both before and after the Constitution was adopted; numerous observations by leading Founders; hundreds of applications from state legislatures; two centuries of public discussion, resolutions, and legislation; and, finally, a string of court cases stretching from 1798 into the twenty-first century in which the judiciary has elucidated the principles and rules of Article V with satisfying clarity and consistency.

This compendium is designed for lawyers involved in activities preparatory to the calling of a convention for proposing amendments. It contains textual exegesis, relevant legal authorities, and sample forms.

This book is divided into four Parts. Part I, which discusses bibliography, lists the major writings on Article V and classifies them into three groups or "waves," according to chronology and accuracy. It is designed to alert the reader at the outset as which writings generally reliable and which to are suffer from misunderstandings that were almost universal during the 1960s and 1970s.

Part II is a Table of Cases. Part III contains exegesis on the procedure, including extensive footnoting, in the manner of a legal treatise. Part IV is a collection of forms. I hope you find this material interesting and useful.

Robert G. Natelson

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Part I. Sources, "Science Fiction," and Article V Bibliography § 1.1. Sources

Many sources offer insight into the meaning of Article V. One's first inquiry is, of course, to the constitutional text. However, as is true on other questions of constitutional law, the meaning of the text of Article V is not always self-evident. In such instances, the courts typically rely on Founding-Era or other historical evidence of meaning.¹

Historical evidence of the meaning of Article V is largely of the same kind used for other parts of the Constitution. It includes usages in eighteenth century dictionaries and other contemporaneous sources, the records left by the Constitution's drafters, the ratification debates in the state conventions and in public venues (such as newspapers), material from the first session of the First Congress, including the first two state applications for an amendments convention, and eighteenth century law and legal documents. In the case of Article V, another important source of information consists of extant records from approximately thirty conventions held among the colonies and states in the century before the Constitution was written.²

Additional light is shed by a mass of material illuminating how the Article V convention—then usually called a "convention of the states"—was understood in the century *subsequent* to the Founding—that is, from the 1790s through the end of the nineteenth century. Three Supreme Court decisions cast light on the procedure.³ State legislatures issued applications and also issued resolutions responding to

¹ See infra § 3.5.

² Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 FLA. L. REV. 615 (2013) [hereinafter Natelson, Conventions], reprinted infra § 5.1.

³ Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (holding that the President has no role in the amending process, and relying on the procedures used in proposing the first ten amendments); Smith v. Union Bank, 30 U.S. 518 (1831) (referring to a convention for proposing amendments as a convention of the states); Dodge v. Woolsey, 59 U.S. 331 (1855) (noting that the electorate no direct role in the amending process).

other states' applications.

During the century after the Founding, there were several further multi-state conventions.⁴ Regional meetings were held in Hartford, Connecticut in 1814 and in Nashville, Tennessee in 1850. The states held a general convention in Washington, D.C. in 1861 in an effort to ward off the Civil War. These conclaves did not qualify as Article V conventions for proposing amendments, but they were close relatives. Indeed, the Washington gathering was a fraternal twin: Although called by Virginia rather than by Congress to propose an amendment to Congress rather than to the states, in every other particular it mimicked an Article V convention. It followed the long-standard convention rules, and produced a proposed amendment. Although Congress remained deadlocked, the Washington gathering itself was a successful dress rehearsal for an amendments convention under Article V.

The twentieth century witnessed at least one multi-state convention, a seven-state "commission" held primarily at Santa Fe, New Mexico in 1922 to negotiate the Colorado River Compact. In addition, much of the twentieth century was marked by intense Article V activity. State legislatures produced scores of applications.⁵ Twenty-nine were issued for a convention to propose an amendment providing for direct election of Senators.⁶ Congress rendered further proceedings unnecessary by proposing the Seventeenth Amendment in 1912, which three-fourths of the states had ratified by the following year. During the 1940s, five states applied for a convention for proposing an amendment limiting the President to two terms.⁷ Again, Congress responded by proposing the Twenty-Second Amendment in 1947.

⁴ See infra § 3.1.

Applications are collected at *The Article V Library*, http://article5library.org/ (last visited Apr. 2, 2014), and one may undertake subject searches there. Another site collecting applications, *Friends of the Article V Convention*, http://www.foavc.org/ (last visited Apr. 2, 2014), is less reliable and must be used cautiously.

⁶ State Article V Applications—By Subject, THE ARTICLE V LIBRARY, http://article5library.org/apptable_by_subject.php (screen by "Direct election of Senators") (last visited Apr. 2, 2014).

⁷ *Id.* (screen by "Limit Presidential Tenure").

Congress proved less responsive to later application campaigns, particularly those to limit its own power or the power of federal judges. For example, Congress stonewalled when, during the 1960s, thirty-three states applied for a convention to partially reverse Supreme Court decisions requiring all state legislative chambers to be apportioned solely by population.⁸ Congress was similarly unmoved when state legislatures repeatedly applied for an amendment requiring a balanced federal budget.⁹

The twentieth century also witnessed the first-ever ratification of a constitutional amendment (the Twenty-First) by state ratifying conventions rather than by state legislatures. Congress opted for that "mode of ratification" despite some forebodings of doom; as matters turned out, the procedure worked reasonably well.

Finally, there were nearly forty reported court cases construing Article V during the twentieth century, including some key decisions from the U.S. Supreme Court.¹⁰ Clearly, there is no lack for material for guidance on the procedures in Article V.

§ 1.2. "Science Fiction"

If an American Founder such as John Dickinson or Alexander Hamilton were to visit us today, he no doubt would be astonished at how little most Americans—

⁸ This campaign died out partly as a result of the passing of its leader, Senator Everett Dirksen (R-IL) and partly because liberal opponents widely disseminated fears that an Article V convention was a "con-con" that might "run away." Although similar claims arose late in the nineteenth century, this seems to have been the first application campaign in which those claims had a significant political impact.

The applications differed in wording sufficiently that it might have been impossible to aggregate all thirty-three. *See id*. The same cannot be said of the applications for direct election of Senators. *Id*. (screen by "Direct election of Senators").

⁹ Thirty-two of the necessary thirty-four states were at one time on record for a balanced budget convention. *See id.* (screen by "Balanced budget").

¹⁰ See Part II.

even those working in constitutional law—know about the convention procedure of Article V. To the Founders, interstate convention protocols were familiar and well-understood, and they fully expected the application and convention process to be employed.

The loss of knowledge appears to have occurred sometime after the early twentieth century. Worse, that knowledge was replaced with a great deal of *misinformation* promulgated by authors, most of whom opposed the idea of states meeting together to propose amendments. Their statements and writings were characterized by little investigation and much speculation.¹¹

Of course, speculation in the absence of facts is always risky, and sometimes produces comical results. Before scientists were able to penetrate the clouds covering the planet Venus, science fiction authors posited a land of jungle and swamps—a vision obviously unconnected to the truth. ¹² In like manner, twentieth century writers portrayed an amendments convention as a congressionally-sponsored mob of placard-wavers. One writer has compared it to the Republican and Democratic National Convention in which hordes of passionate delegates, untethered to any agenda, become flushed with the power to remake the country. ¹³

¹¹ See, e.g., Charles L. Black, Jr., The Proposed Amendment of Article V: A Threatened Disaster, 72 YALE L.J. 957 (1963); ———, Amending the Constitution: A Letter to a Congressman, 82 YALE L.J. 189 (1972); William F. Swindler, The Current Challenge to Federalism: The Confederating Proposals, 52 GEO. L.J. 1 (1963–1964). Professor Swindler argued expressly that only Congress should be allowed to initiate amendments and that state efforts to do so should be ignored, despite the language of the Constitution! Id. at 23, 33. He justified this, in part, by saying that then-pending state-based initiatives were "alarmingly regressive." Id. at 38.

¹² See The Greenhouse in the Sky? CHEMISTRY WORLD, http://www.rsc.org/chemistryworld/Issues/2006/April/Greenhousesky.asp (last visited Apr. 2, 2014) (contrasting prior science-fiction speculation with the actual surface of Venus).

¹³ E.g., Phyllis Schlafly, Is Article V in Our Future?, TOWN HALL MAG., Aug. 27, 2013, available at http://townhall.com/columnists/phyllisschlafly/2013/08/27/is-article-v-in-our-future-n1673875/page/full. ("Now imagine Democratic and Republican conventions meeting in the same hall and trying to agree on constitutional changes.").

This "science fiction" version of Article V largely dominated the writings of the 1960s and 1970s. In the last few years, however, we have been able to re-capture the traditional knowledge.

§ 1.3. The Three Waves of Modern Article V Bibliography

We can trace our recovery of Article V information by classifying modern bibliography on the subject into three phases or "waves":

- *First Wave* publications date mostly from the 1960s and 1970s. These were authored predominantly by liberal academics who opposed conservative efforts to trigger a convention and who therefore emphasized uncertainties.
- Second Wave publications were issued between 1979 and 2000. The Second Wave was a transitional body of work relying on additional sources.
- *Third Wave* publications are those written since 2010. In the aggregate, they fully reconstruct convention procedures and law from all the historical and legal sources.

First Wave publications tended to be agenda-driven. Even when they were not, they were sparse on research: First Wave authors seldom ventured beyond snippets of *The Federalist* and a few excerpts from the proceedings of the 1787 Constitutional Convention. Virtually all those authors seemed unaware of any precedents other than the 1787 Constitutional Convention.

In the absence of reliable facts, First Wave authors created a largely speculative version of Article V. Without models other than the 1787 gathering, they assumed that a convention for proposing amendments would be a "constitutional convention." They further assumed that the congressional power to call gave Congress wide authority over the process and that the courts would have little role. Some envisioned a mob scene of hundreds or thousands of delegates popularly elected, without state legislative involvement. Most (but not all) First

Wave authors claimed that this "constitutional convention" could not be limited to a single subject, and could venture anywhere it chose.

First Wave authors based their speculations on some interesting techniques. For example, some asserted that because some Founders had referred to an amendments convention as a "general convention," they must have meant that the gathering was necessarily unlimited as to subject. In fact, however, the Founders' term "general" refers to the number of states that participate in the assembly, not the scope of the agenda.¹⁴

Dissatisfaction with such raw speculation encouraged a new breed of writers to revisit the issue. The Second Wave began in 1979 when John Harmon, a Justice Department lawyer, produced a legal opinion for the Department that, unlike First Wave publications, considered a range of materials drawn from the debates over the Constitution's ratification. The most elaborate Second Wave publication was Russell Caplan's book, *Constitutional Brinksmanship*, released in 1988 by Oxford University Press. Caplan utilized ratification materials and court opinions in his study, and even made brief reference to earlier interstate conventions.

Access to this wider range of sources led most Second Wave authors to understand that an Article V gathering could be limited as to subject. But their unfamiliarity with other aspects of the record induced them to persevere in other First Wave errors. For example, several continued to refer to an Article V conclave as a "constitutional convention," and some assumed that Congress had authority to prescribe the method of delegate selection. Some even committed new mistakes. 16

¹⁴ Natelson, Conventions, at 629. For examples of this misunderstanding, see Charles L. Black, Amending the Constitution: A Letter to a Congressman, 82 YALE L.J. 189, 198 (1972) (describing an unlimited convention as a "general" one), and Walter E. Dellinger, The Recurring Question of the "Limited" Constitutional Convention, 88 YALE L.J. 1623, 1632 n.47 (1978–1979) (assuming that because Madison referred to a "general" convention he meant an unlimited one).

¹⁵ John M. Harmon, Constitutional Convention: Limitation of Power to Propose Amendments to the Constitution, 3 Op. O.L.C. 390 (1979).

¹⁶ Thus, in Bruce M. Van Sickle & Lynn M. Boughey, A Lawful and Peaceful Revolution, Article V and Congress' Present Duty to Call a Convention for Proposing Amendments, 14 HAMLINE L. REV. 1,

The Third Wave of publications began around 2010. Third Wave findings enlist not only the records of the Constitution's drafting and ratification, but also the pre-existing convention tradition and contemporaneous law. These materials are supplemented by case law and actual practice over the two centuries since the Founding. As a result, Third Wave writings have relegated earlier commentaries to merely historical interest.

Following are the principal conclusions of Third Wave scholarship:

- A convention for proposing amendments is a diplomatic meeting among delegations representing the state legislatures—truly a convention of states;
- It is a limited purpose gathering, not a "constitutional convention";
- It was modeled after a long tradition of limited-purpose multi-state assemblies that followed established protocols and procedures;
- Not only can the convention be limited as to subject, but Founders expected all or most amendments conventions to be so limited;
- Congressional power over the convention process is limited to counting and classifying applications and setting a time and place for meeting; and
- Article V questions can, and often have been, adjudicated by the courts.

§ 1.4. Major Publications

Third Wave Publications (after 2010)

NICK DRANIAS, STATES CAN FIX THE NATIONAL DEBT: REFORMING WASHINGTON WITH THE COMPACT FOR AMERICA BALANCED BUDGET AMENDMENT (Goldwater Inst., 2013)

——, Use it or Lose it: Why States Should Not Hesitate to Wield their Article V Powers (2012), LIBRARY OF LAW & LIBERTY (Jan. 2, 2012), http://www.libertylawsite.org/liberty-forum/use-it-or-lose-it-why-states-should-not-

28–29 (1990–1991), the authors argued that because Article V used of the word "amendments" (in the plural), it necessarily prevented limiting a convention to a single subject. This conclusion flies in the face of history.

hesitate-to-wield-their-article-v-powers/ Robert G. Natelson, Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments," 65 FLA. L. REV. 615 (2013) —, James Madison and the Constitution's "Convention for Proposing" Amendments," in Union and States' Rights: A History and Interpretation of INTERPOSITION, NULLIFICATION, AND SECESSION 150 YEARS AFTER SUMTER (Neil H. Cogan ed., 2013) ———, THE ALEC ARTICLE V HANDBOOK (Am. Legislative Exch. Council, 2d ed. 2013), availablehttp://www.alec.org/wp-content/uploads/article-fiveathandbook-1.pdf. ——, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 TENN. L. REV. 693 (2011) ———, AMENDING THE CONSTITUTION BY CONVENTION: PRACTICAL GUIDANCE FOR CITIZENS AND POLICYMAKERS (Independence Inst., 2012) (updated and amended version of an earlier paper published by the Goldwater Institute) ———, AMENDING THE CONSTITUTION BY CONVENTION: LESSONS FOR TODAY FROM THE CONSTITUTION'S FIRST CENTURY (Independence Inst., 2011) (updated and amended version of an earlier paper published by the Goldwater Institute) ———, AMENDING THE CONSTITUTION BY CONVENTION: A MORE COMPLETE VIEW OF THE FOUNDERS' PLAN (Independence Inst., 2010) (updated and amended version of an earlier paper published by the Goldwater Institute)

Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 Const. Comment. 53 (2012)

Michael Stern, Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention, 78 Tenn. L. Rev. 765 (2011)

————, A Brief Reply to Professor Penrose, 78 TENN. L. REV. 807 (2011)

Second Wave Publications (1979–2000) (superseded, but still often useful)

RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988) (the leading Second Wave

publication and an important starting point for Third Wave scholarship)

Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 Harv. L. Rev. 386 (1983–1984) (correcting the view that the courts have no role in Article V)

Ann Stuart Diamond, A Convention for Proposing Amendments: The Constitution's Other Method, 11 State of Am. Federalism 113 (1980)

John M. Harmon, Constitutional Convention: Limitation of Power to Propose Amendments to the Constitution, 3 Op. O.L.C. 390 (1979) (an unusually thorough piece of work for its time, and the transition to Second Wave writings)

Paul Monaghan, We the People[s], Original Understanding, and Constitutional Amendment, 96 COLUM. L. REV. 121 (1996)

Michael Stokes Paulsen, A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment, 103 Yale L.J. 677 (1993)

Grover Joseph Rees III, The Amendment Process and Limited Constitutional Conventions, 2 Benchmark 66 (1986)

Ronald D. Rotunda & Stephen J. Safranek, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 MARQ. L. REV. 227 (1996–1997)

U.S. DEPT. OF JUSTICE, OFFICE OF LEGAL POLICY, LIMITED CONSTITUTIONAL CONVENTIONS UNDER ARTICLE V OF THE UNITED STATES CONSTITUTION (1987)

Bruce M. Van Sickle & Lynn M. Boughey, A Lawful and Peaceful Revolution, Article V and Congress' Present Duty to Call a Convention for Proposing Amendments, 14 Hamline L. Rev. 1 (1990–1991)

First Wave Publications (generally before 1980) (no longer useful)

AM. BAR ASS'N, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1973) (the best researched of the First Wave publications)

Charles L. Black, Jr., The Proposed Amendment of Article V: A Threatened Disaster, 72 Yale L.J. 957 (1963)

———, Amending the Constitution: A Letter to a Congressman, 82 Yale L.J.

189 (1972)

Arthur E. Bonfield, Proposing Constitutional Amendments by Convention: Some Problems, 39 Notre Dame L. Rev. 659 (1964)

———, The Dirksen Amendment and the Article V Convention Process, 66 Mich. L. Rev. 949 (1967–1968).

Dwight W. Connely, Amending the Constitution: Is This Any Way to Call a Constitutional Convention?, 22 Ariz. L. Rev. 1011 (1980)

Walter E. Dellinger, The Recurring Question of the "Limited" Constitutional Convention, 88 Yale L.J. 1623 (1978–1979)

Sam J. Ervin, Jr., Proposed Legislation to Implement the Convention Method of Amending the Constitution, 66 MICH. L. REV. 875 (1967)

Bill Gaugush, Principles Governing the Interpretation and Exercise of Article V Powers, 35 WESTERN Pol. Q. 212 (1982) (despite its date, this is essentially a First Wave publication)

Gerald Gunther, The Convention Method of Amending the United States Constitution, 14 Ga. L. Rev. 1 (1979)

Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903 (1967–1968)

Philip L. Martin, The Application Clause of Article V, 85 Pol. Sci. Q. 616 (1970)

John T. Noonan, Jr., The Convention Method of Constitutional Amendment: Its Meaning, Usefulness, and Wisdom, 10 PAC. L.J. 641 (1979)

Note, Proposing Amendments to the United States Constitution by Convention, 70 Harv. L. Rev. 1067 (1957)

Note, Proposed Legislation on the Convention Method of Amending the United States, 85 Harv. L. Rev. 1612 (1972)

William F. Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 Geo. L.J. 1 (1963–1964)

Laurence H. Tribe, Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment, 10 PAC. L.J.

627 (1979) (a list of questions about conventions, but without research to resolve them)

William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295 (an unusual First Wave article in that it concludes that conventions may be limited)

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Part III. Explanatory Text with Footnotes

§ 3.1. Historical Background¹⁷

In seventeenth and eighteenth century Anglo-American practice, a "convention" was an assembly, other than a legislature, convened to address ad hoc political problems. ¹⁸ In England, conventions re-enthroned the Stuart royal line in 1660 and granted the throne to William and Mary in 1689. The latter convention promulgated the English Declaration of Rights.

Americans also began to meet in convention during the late seventeenth century. Many conventions were bodies that convened only within a particular colony or state. Others were diplomatic assemblies of governments, which sometimes were called "congresses" as well as "conventions." (The two terms were interchangeable.) We have records of about twenty conventions among colonies before Independence in 1776 and of eleven additional ones among states through 1787. Among the latter were meetings in Springfield, Massachusetts and York Town, Pennsylvania in 1777, in New Haven, Connecticut in 1778, in Philadelphia in 1780, in Annapolis in 1786, and of course the Constitutional Convention in 1787.

Multi-colony and multi-state conventions developed standard protocols.²⁰ The procedure would begin when a colony or state (or, less commonly, the Continental Congress or a prior convention) issued an invitation to other governments to meet at a prescribed place and time to discuss one or more subjects. The subjects might include Indian affairs, common defense, war supply, inflation, trade, or other topics. This invitation was the *call* or sometimes the *application*.²¹ The latter term also

¹⁷ On this history, see generally Natelson, *Conventions*.

¹⁸ Natelson, Conventions, at 624; Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 TENN. L. REV. 693, 706 (2011) [hereinafter Natelson, Rules], reprinted infra § 5.2; cf. Opinion of the Justices, 167 A. 176, 179 (Me. 1933) ("The principal distinction between a convention and a Legislature is that the former is called for a specific purpose, the latter for general purposes.").

¹⁹ Natelson, Conventions, at 620; Natelson, Rules, at 707–08.

²⁰ These are discussed generally in Natelson, *Conventions*.

²¹ On terminology, see Natelson, Conventions, at 629-32. For an example of the term "application"

could refer to a request to Congress to issue a call.²² The proposed meeting might be *partial*—that is, limited to the governments in a certain region of the country—or *general*: including all or most of the colonies or states. The procedures for partial and general conventions were identical.

Because these were meetings among governments, the procedures were based on those prevailing in international law for meetings among sovereigns.²³ Each colony or state sent a *committee* (delegation) of *commissioners* (delegates) empowered by documents called *commissions*. The call and the commissions defined the outer scope of the commissioners' powers. At the conclave each government received one vote, irrespective of the size of its committee. The convention elected its own officers and established its own rules.

Many of the Constitution's Framers and leading ratifiers had served as commissioners to multi-government conventions. Those who had not were familiar with the process from their experience in government service. Article V's "Convention for proposing Amendments" was modeled after these meetings. ²⁴ Indeed, the phrase "convention of the states" ²⁵ and similar expressions ²⁶ remained the usual way of referring to an Article V amendments convention from the time the Constitution was ratified and for many decades thereafter.

During the century following the Constitution's ratification, states continued to meet in conventions. Thus, the 1814 Hartford Convention was a "partial" gathering of delegates from the New England states designed to coordinate the

being used as a synonym for "call," see *id*. at 642 (reproducing a letter from the then-president of Massachusetts leading to the 1776–1777 Providence Convention). For additional terminology, see Natelson, *Rules*, at 698–99, 708.

²² Natelson, Conventions, at 667.

²³ Russell Caplan, Constitutional Brinksmanship: Amending the Constitution by National Convention 95–96 (1988).

²⁴ Natelson, Conventions, at 680–85.

²⁵ E.g., Smith v. Union Bank, 30 U.S. 518, 528 (1831).

²⁶ Natelson, *Conventions*, at 684–85 (reproducing language of early state applications and a responsive resolution).

response among those states to the unpopular War of 1812. It endorsed a series of amendments to the Constitution.²⁷ Because, however, it met outside the sanction of Article V it could not issue ratifiable proposals. Another regional convention was the gathering of nine states at Nashville, Tennessee in 1850. It sought to coordinate response among Southern States to federal policy.²⁸ Finally, at least one multi-state convention met during the twentieth century. This was the eight-state "Colorado River Commission," a gathering that assembled, primarily in Santa Fe, New Mexico, to negotiate the Colorado River Compact.

The 1861 Washington Conference Convention—the largest multi-state convention ever held—was "general" in nature, with most of the non-seceding states in attendance. Its purpose was to propose a constitutional amendment to stave off the Civil War.²⁹ Because it, too, met outside Article V, it could not issue its proposal to the states directly, so it sought action from Congress—which was not forthcoming.

What is notable is that all four followed the convention protocols established

²⁷ Amendments to the Constitution Proposed by the Hartford Convention: 1814, YALE LAW SCHOOL, http://avalon.law.yale.edu/19th_century/hartconv.asp (last visited Apr. 4, 2014). The journal is also available in A SHORT ACCOUNT OF THE HARTFORD CONVENTION (Theodore Lyman ed., 1823).

The proceedings are collected in A Report of the Debates and Proceedings in the Secret Sessions in the Conference Convention for Proposing Amendments to the Constitution of the United States (L.E. Chittenden ed., 1861) [hereinafter Washington Conference Report]. For a modern treatment, see Robert Gray Gunderson, Old Gentlemen's Convention: The Washington Peace Conference of 1861 (1961). (The name of the book comes from a derogatory comment by abolitionist Horace Greeley).

²⁸ See Thelma Jennings, The Nashville Convention: Southern Movement for Unity, 1848–1850 (1980). This gathering, called by the State of Mississippi, also was known as the Southern Convention.

²⁹ The official name of the gathering was the Washington Conference Convention, but it is also commonly referred to as the "Washington Peace Conference." It was called by Virginia, and attended by twenty-one states after several already had seceded. Former President John Tyler served as convention president.

during the seventeenth and eighteenth centuries.³⁰ And the Washington, D.C. meeting acted as an Article V Convention in almost every particular.

§ 3.2. Types of Conventions

For constitutional purposes, one can classify conventions sponsored by American governments in several different ways: in-state and multi-state; conventions to propose, conventions to ratify, and conventions with power to do both; and those that are plenipotentiary and those limited in their powers.

§ 3.2.1. In-State versus Multi-State Conventions

An *in-state convention* is a meeting of delegates from a single state. An example is a state constitutional convention or a state ratifying convention of the kind that approved the Twenty-First Amendment. In such gatherings, delegates usually are popularly elected by, and represent, the people—although during the Founding Era there were some in-state conventions composed of delegations from towns or other local governments. The Constitution authorizes two kinds of in-state conventions: those authorized to ratify the Constitution and those authorized to ratify amendments.³¹

By contrast, a *multi-state*, *interstate*, *or federal convention* is a gathering of representatives of the states or state legislatures.

§ 3.2.2. Proposing and Ratifying Conventions

A proposing convention is charged only with proposing solutions to prescribed problems. As its name suggests, the convention for proposing amendments is of this kind. Other illustrations include the 1787 Constitutional Convention and the 1861 Washington Conference Convention.

A ratifying convention is charged only with ratifying or rejecting specific

³⁰ The Hartford journal does not reveal how votes were tabulated (by commissioner or by state), but otherwise its proceedings are consistent.

³¹ U.S. CONST., arts. V, VII.

proposals. Examples of ratifying conventions are the in-state assemblies that approved the Constitution³² and those that approved the Twenty-First Amendment (repealing Prohibition).³³

Some conventions possess power to propose and approve.³⁴ During the Revolutionary War, some in-state conventions enjoyed both proposing and ratifying power, particularly if the state's legislature was not functioning. By contrast, most multi-state conventions were authorized to propose only. However, the 1780 Philadelphia Price Convention was empowered to both propose and decide,³⁵ and an early draft of the Constitution would have granted an amendments convention authority to both propose and decide. Obviously, the Framers ultimately rejected that approach.³⁶

§ 3.2.3. Plenipotentiary and Limited Conventions

A plenipotentiary convention is one with an unlimited mandate, or at least a mandate that is very broad. The term comes from international diplomatic practice. During the Founding Era, the in-state conventions that managed their governments in absence of the legislature enjoyed plenipotentiary authority. However, the Constitution does not authorize any plenipotentiary conventions.

A *limited* convention is restricted to one or more topics. The most extreme

³² U.S. CONST., art. VII.

On the latter, see RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: STATE CONVENTION RECORDS AND LAWS (Everett Somerville Brown ed., 1938). For a shorter treatment, see Everett Somerville Brown, *The Ratification of the Twenty-First Amendment*, 29 AM. Pol. Sci. Rev. 1005 (1935) [hereinafter Brown, *Ratification*].

The division between proposal and decision was elucidated by the seventeenth century political author James Harrington in his *Commonwealth of Oceana*—a work hugely popular among the Founders. Harrington compared it to the common domestic situation in which one girl cuts a cake while the other gets to choose which piece is hers. He therefore referred to it as "dividing" and "choosing."

³⁵ Natelson, Conventions, at 656.

³⁶ *Id.* at 621–22.

example of a limited convention is a ratifying convention, whose only power is to approve or reject a pre-set proposal.

Multi-state proposing conventions invariably have been authorized to deliberate, debate, draft, and recommend solutions to prescribed problems. Sometimes the agenda handed to them has been very broad, as in the case of the First Continental Congress (1774). Sometimes the agenda has been very narrow, as in the case of the 1781 Providence Convention, which was confined to New England military supply issues for a single year. But in no case has a proposal convention been told merely to approve or disapprove language prescribed in advance. Such a procedure would inhibit the deliberative purpose of a proposal convention, and would ill-suit the dignity of an assembly of semi-sovereigns.

§ 3.2.4. Categorizing the Constitutional Convention and the Convention for Proposing Amendments

The Constitutional Convention

There is an oft-repeated claim that Congress called the 1787 Constitutional Convention and restricted it to amending the Articles, but that claim is simply erroneous.³⁷

What actually happened was that the 1786 Annapolis Convention issued a recommendation to its participating state governments (a resolution analogous to the application referred to in Article V). Pursuant to that resolution, two of the participating states, Virginia and New Jersey, called another federal convention for May of 1787. Neither the Annapolis resolution, nor the state calls, nor the convention itself occurred pursuant to the Articles of Confederation. They were exercises of the states' reserved powers. Nor was the convention limited to proposing amendments to the Articles. Instead, the call and the commissions issued

³⁷ After most of the states already had accepted the invitation to participate, Congress passed a weak resolution expressing the "opinion" that the convention be limited to amending the Articles. All but two states disregarded this "opinion," but many writers have confused it with the convention call. Natelson, *Conventions*, at 674–79.

by ten states empowered the convention to recommend any and all expedient changes to the "foederal constitution" ³⁸—a phrase that in the language of the time referred to the entire political system.

The 1787 gathering in Philadelphia was obviously a *multi-state* or *federal* convention rather than one limited to a single state. Just as obviously, it was a proposing rather than a ratifying body. Although technically limited, the breadth of its charge caused it to lean toward the *plenipotentiary* side.

The Convention for Proposing Amendments

This also is a multi-state gathering or "convention of states." ³⁹ Unlike the

³⁸ 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 559–86 (Max Farrand ed., 1939) [hereinafter FARRAND'S RECORDS].

³⁹ Some writers have depicted a convention for proposing amendments, as least potentially, as a popularly-elected gathering directly representing the people. However, the Supreme Court refers to it not as a "convention of the people" but as a "convention of the states," Smith v. Union Bank, 30 U.S. 518, 528 (1831). The Court's characterization is confirmed by a large body of uncontradicted Founding-Era evidence. This evidence includes, *inter alia*, contemporaneous convention practice and discussions of the procedure during the Constitutional Convention and during the ratification debates. Natelson, *Rules*, at 715–32. *See generally* Natelson, *Conventions*.

In addition, the Founding Generation often referred to an amendments convention as a "convention of the states." This usage appears in contemporaneous legislative resolutions on the subject. See, for example:

- The first application for an Article V convention. 1 ANNALS OF CONGRESS 28–29 (1789) (Joseph Gales ed., 1834) (reproducing Virginia application of Nov. 14, 1788, calling an amendments convention "a convention of the states");
- The Pennsylvania legislature's resolution disapproving that application. MINUTES OF THE THIRTEENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA IN THEIR SECOND SESSION 124–25 (Mar. 5, 1789) (calling an amendments convention "a convention of the states");
- A letter from the Virginia legislature to the Governor of New York successfully urging New York to adopt its own application. JOURNAL OF THE HOUSE OF ASSEMBLY OF THE STATE OF NEW-YORK 25 (Dec. 27, 1788) (calling an amendments convention "a Convention of the States"); and

Constitutional Convention, which was called by the states in their sovereign capacity, a convention for proposing amendments is called pursuant to the Constitution. It draws its authority from the Constitution, to the extent permitted by the applications and calls. Its authority is therefore limited to the scope of those documents, and is necessarily narrower than the authority of a constitutional convention. On the other hand, the fact that it is a *proposing* body suggests that its discretion cannot be confined to approving or rejecting prescribed language, as in the case of ratifying convention.

§ 3.3. Why the Founders Adopted the Proposal Convention in Article V.

An early draft of the Constitution permitted amendments to be proposed and adopted only by interstate convention. Then the Framers added provisions allowing Congress to propose amendments and requiring state ratification. Congress received the power to propose because the Framers believed that Congress's position would enable it readily to see defects in the system.

However, some delegates—notably George Mason of Virginia—pointed out that Congress might become abusive or exceed its powers. It might therefore refuse to adopt a necessary or desirable amendment, particularly one designed to curb its own authority. Accordingly, the Framers added the convention for proposing amendments as a vehicle for the states to present corrective amendments for ratification while bypassing Congress.⁴⁰

[•] A Rhode Island legislative resolution on the same subject. 10 RECORDS OF THE STATE OF RHODE ISLAND 309–10 (John Russell Bartlett ed., 1865) (General Assembly resolution of Oct. 27, 1788) (calling an amendments convention a "general convention of the states").

⁴⁰ On the framing process, see Natelson, Conventions, at 621–24; Natelson Rules, at 699–702; Michael Stern, Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention, 78 Tenn. L. Rev. 765, 767–70 (2011) [hereinafter Stern, Reopening], reprinted infra § 5.4; see also Idaho v. Freeman, 529 F. Supp. 1107, 1132 (D. Idaho 1981), judgment vacated as moot, sub nom. Carmen v. Idaho, 459 U.S. 809 (1982) ("[T]he drafters of the Constitution found it appropriate to grant the same power to propose amendments to both the local [state] and national

The purpose of the convention as a "congressional bypass" was much discussed during the debates over the ratification of the Constitution. Illustrative was the comment of Samuel Rose, a New York state legislator who supported the Constitution at his state's ratifying convention:

The reason why there are two modes of obtaining amendments prescribed by the constitution I suppose to be this—it could not be known to the framers of the constitution, whether there was too much power given by it or too little; they therefore prescribed a mode by which Congress might procure more, if in the operation of the government it was found necessary; and they prescribed for the states a mode of restraining the powers of government, if upon trial it should be found that they had given too much.

James Madison stated it more succinctly in *The Federalist No. 43*: The Constitution "equally enables the General, and the State Governments, to originate the amendment of errors, as they may be pointed out by the experience on one side or on the other."

§ 3.4. Analyzing the Text of Article V

Article V of the Constitution can be analyzed in four distinct parts, designated below by different type faces:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided

that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The <u>underlined</u> language is the procedure by which amendments are formally proposed. Formal proposal is a condition precedent to the remaining steps, so it occurs first in the amendment process.

The **bolded** language, although placed third, occurs second in the amendment process, when Congress designates a "Mode of Ratification" for formal proposals. Obviously, Congress has no authority to designate a mode of ratification unless the potential amendment has been properly proposed.

The *italicized* language outlines the ratification process, which occurs only after proposal and congressional selection of the mode of ratification. The final proviso, set forth in ordinary roman type, prohibits certain kinds of amendments. It is a reminder that the Article V procedure is carried out subject to what Madison called "the forms of the Constitution." One cannot use Article V to obtain unconstitutional results. For example, neither Congress nor a convention for proposing amendments has power to alter the ratification procedure, as alarmists sometimes suggest. Any effort by the convention to do would be ignored by other agencies of government, including the courts.

Now, let us focus on the proposal and ratification portions of Article V: The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution,

⁴¹ Cf. Michael B. Rappaport, The Constitutionality of a Limited Convention: An Originalist Analysis, 28 CONST. COMMENT. 53, 92–93 (2012) [hereinafter Rappaport, Limited Convention] reprinted infra § 5.3.

when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof

Observe that Article V provides two methods of proposal and two methods of ratification. Both methods of ratification have been employed: state conventions ratified the Twenty-First Amendment and state legislatures ratified all the rest. The congressional method of proposal has been used to completion, but the state application and convention method has not. Let us focus on the language that governs the latter: "[O]n the Application of the Legislatures of two-thirds of the several States, [Congress] shall call a Convention for proposing Amendments "

The following is clear from the language:

- If two-thirds of the states make "Application" to Congress for a convention,
- Congress "shall" (must) "call" one, and
- The power granted to the convention is "proposing Amendments."

The text has taken us far, but has left some questions. They include:

- (1) When the state legislatures act, do they act pursuant to powers delegated by Article V, or by virtue of the powers reserved by the Tenth Amendment?
- (2) What is a state "Legislature"? Does the term refer to the entire legislative body of the state, including any participation by the governor and the people's initiative and referendum power? Or does it refer only to a state's representative assembly?
- (3) What is an application?
- (4) What is a call?

in the next section.

(5) What, in this context, is a "convention" and how is it constituted? Fortunately, the answers to all of those questions are recoverable, and are provided

§ 3.5. Applicable Legal Principles: Interpretation, Incidental Powers, Fiduciary Obligations

Contrary to some suggestions,⁴² Article V questions are freely justiciable.⁴³ Indeed, "the judiciary . . . has . . . dealt with virtually all the significant portions of that article,"⁴⁴ and the courts apply similar rules of interpretation to Article V as to other parts of the Constitution. If there is a difference, it is that the courts' interpretive approach to Article V cases is more traditional than the sometimes freewheeling approach the Supreme Court adopts when construing the Commerce Power or the Due Process Clauses.

Accordingly, the judiciary holds that when Article V's language is indisputably clear—such as the grant of discretion to Congress to select a mode of ratification⁴⁵—the clear language must be enforced.⁴⁶ But when the meaning is less

⁴² Some writers cite stray Supreme Court dicta or concurrences suggesting that congressional control over the amendment process is unreviewable. White v. Hart, 80 U.S. 649 (1871); Coleman v. Miller, 307 U.S. 438, 456 (1939) (Black, J., concurring). Black's *Coleman* concurrence has had a disproportionate effect on public perceptions, considering (1) the patent implausibility of its core claim (it asserted, in the teeth of the constitutional language, that *Congress* has absolute control of the amendment process), see Idaho v. Freeman, 529 F. Supp. 1107, 1135–36 (D. Idaho 1981), judgment vacated as moot, sub nom. Carmen v. Idaho, 459 U.S. 809 (1982), (2) that it was not the opinion of the Court, (3) that it has never been followed and (4) that the courts have universally repudiated it!

Opinion of the Justices, 172 S.E. 474 (N.C. 1933) (stating that whether an amendment is ratified ultimately is determined by the Supreme Court); Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.); *Freeman*, 529 F. Supp. 1107. See also the Article V cases cited throughout this book. See supra Part II.

⁴⁴ Freeman, 529 F. Supp. at 1126.

⁴⁵ United States v. Sprague, 282 U.S. 716 (1931). The language in *Sprague* was arguably, broader—that all of Article V precluded interpretation—but other parts of Article V were not at issue. *See Coleman*, 307 U.S. 438 (referring to the "familiar principle, what was there said must be read in the light of the point decided"). As the footnotes in this work demonstrate, the courts, including the Supreme Court, have freely interpreted the less-obvious portions of the Article.

⁴⁶ Hawke v. Smith ("Hawke I"), 253 U.S. 221 (1920).

obvious, courts consult Founding-Era evidence of meaning and, on occasion, evidence of subsequent usage.⁴⁷

The Supreme Court observed in one Article V case that "with the Constitution or other written instrument, what is reasonably implied is as much a part of it as what is expressed." ⁴⁸ Accordingly, just as the Constitution's other express grants carry with them incidental powers, ⁴⁹ so do the grants in Article V. ⁵⁰ In other words, a grant of power to an assembly operating under Article V carries with it subordinate powers that, at the time the Constitution was adopted, customarily accompanied such a grant, or are otherwise reasonably necessary to carrying out the grant. ⁵¹

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⁴⁷ Hollingsworth v. Virginia, 3 U.S. 381 (1798) (following practice pertaining to first ten amendments); Opinion of the Justices, 167 A. 176, 179 (Me. 1933) (determining the mode of election for a state ratifying convention by consulting historical practice); Leser v. Garnett, 258 U.S. 130 (1922) (relying on history to affirm validity of the procedure adopted for the Fifteenth, and therefore the Nineteenth, Amendment); United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954) (citing history of judicial reliance on the Fourteenth Amendment as evidence that it had been validly adopted); *Dyer*, 390 F. Supp. at 1306–07 (applying historical evidence in determining how conventions determine voting rules); Barlotti v. Lyons, 189 P. 282 (Cal. 1920) (citing Founding-Era evidence in defining the Article V word "legislature").

⁴⁸ Dillon v. Gloss, 256 U.S. 368, 373 (1921) (holding that Congress has power to limit time for ratification as incidental to its selection of a mode of ratification).

⁴⁹ Natelson, *Rules*, at 704–06. The Founding-Era law of principals and incidents and its implication for constitutional interpretation are discussed in Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in The Origins of the Necessary and Proper Clause, in The Origins of the Necessary AND Proper Clause 52, 60–68 (2010). The basic concepts outlined there were adopted by Chief Justice Roberts in his discussion of the Clause in National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2591 (2012).

⁵⁰ *Dillon*, 256 U.S. at 373 (holding that Congress has power to limit time for ratification as incidental to its selection of a mode of ratification); State *ex rel*. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933) (holding that Article V gives state legislatures power to provide for ratifying conventions); State *ex rel*. Donnelly v. Myers, 186 N.E. 918 (Ohio 1933) (stating that the calling of a convention is an incidental duty of the state legislature when Congress chooses that mode of ratification).

⁵¹ Myers, 186 N.E. 918 (stating that the calling of a convention is an duty of the state legislature when Congress chooses that mode of ratification because it is "necessary and incidental" to

The Article V process includes some agency relationships. Congress serves as an agent for the states in counting applications and calling the convention. Commissioners at the convention serve as agents for their respective state legislatures. Traditional convention practice tells us that normal rules of fiduciary conduct apply in these relationships.⁵² These include (1) an obligation by Congress to treat all of its principals (the state legislatures) impartially (2) obligations by commissioners to remain with the scope of their powers and otherwise obey instructions, and (3) the power of state legislatures to recall commissioners.

§ 3.6. Assemblies Acting under Article V Do So Solely by Virtue of Powers Granted by Article V.

Like some other parts of the Constitution, Article V grants a list of enumerated powers. The grants are made to designated legislatures and conventions.⁵³ A legislature or convention exercising authority under Article V may be called an *Article V assembly*.

The grants under Article V, together with their incidental powers, are the sole source of authority for amending the Constitution.⁵⁴ Thus, Congress holds no amending authority by virtue of other grants in the Constitution. The state legislatures hold none by virtue of powers reserved under the Tenth Amendment.⁵⁵

ratification); see also Sevier, 62 S.W.2d 895 (holding that Article V gives state legislatures power to provide for ratifying conventions).

⁵² Natelson, Rules, at 703-04.

⁵³ Hawke v. Smith ("Hawke I"), 253 U.S. 221 (1920); see also Hawke v. Smith ("Hawke II"), 253 U.S. 231 (1920).

⁵⁴ Prior v. Norland, 188 P. 729 (Colo. 1920).

United States v. Sprague, 282 U.S. 716, 733 (1931) (holding the Tenth Amendment irrelevant because, "The fifth article does not purport to delegate any governmental power to the United States On the contrary . . . the article is a grant of authority by the people to Congress, and not to the United States."); United States v. Thibault, 47 F.2d 169 (2d Cir. 1931) (holding that Tenth Amendment is not relevant in the ratification process); Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977); Dyer v. Blair, 390 F. Supp. 1291, 1307 (N.D. Ill. 1975) (Stevens, J.).

The law governing the amendment process is federal, not state, law.⁵⁶

Assemblies acting under Article V are not departments of the federal government, but they do exercise a "federal function." ⁵⁷ In that capacity, Congress and state legislatures act as proposing or assenting bodies on behalf of the people rather than as legislatures. ⁵⁸

The Article V grants of power are as follows:⁵⁹

- Authority to two-thirds of each house of Congress to "propose" amendments;
- Authority to two-thirds of the state legislatures power to make "Application" for a convention for proposing amendments;
- Authority to Congress power to "call" that convention;
- Authority to the convention "for proposing" amendments;
- Authority to Congress to decide whether ratification shall be by state legislatures or state conventions;
- If Congress selects the former method, authority to state legislatures to ratify or reject;
- If Congress selects the latter method, implied authority and a mandate to each state legislature to call a ratifying convention;
- Authority to three fourths of those conventions to ratify; and
- Authority incidental to the foregoing, such as the authority of all Article V
 assemblies to establish their own rules,⁶⁰ and the power of state

⁵⁶ Coleman v. Miller, 307 U.S. 438 (1939).

Leser v. Garnett, 258 U.S. 130, 137 (1922) (Brandeis, J.); State ex rel. Donnelly v. Myers, 186 N.E.
 918 (Ohio 1933); State ex rel. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933).

⁵⁸ Hollingsworth v. Virginia, 3 U.S. 381 (1798); *Prior*, 188 P. 729; *Hawke I*, 253 U.S. 221; *see also Hawke II*, 253 U.S. 231; Dillon v. Gloss, 256 U.S. 368, 374 (1921) (stating that people assent to amendments through representative assemblies); *Sevier*, 62 S.W.2d 895.

⁵⁹ For a slightly different formulation, see Natelson, *Rules*, at 702–03.

⁶⁰ Opinion of the Justices, 167 A. 176 (Me. 1933) (ratification conventions pass on the elections of their own members); *Dyer*, 390 F. Supp. at 1306 (referring to power of Article V assembly to establish its own rules).

legislatures to define the scope of their applications, to determine the mode for selecting commissioners (delegates), and to fix how state ratifying conventions are selected.

Additional information on both principal and incidental powers is found in later sections of this part.

§ 3.7. Under Article V, a State "Legislature" Means the State's Representative Assembly, without Participation by the Governor or by Any Reserved Power of Initiative or Referendum.

Article V grants authority to assemblies as such, not to branches of the federal or state governments. A state "Legislature," as Article V uses the term means the state's law-making representative body, not the entire legislative power of the states. ⁶¹ Thus, the President need not sign, and may not veto, congressional amendment proposals. ⁶² Similarly, state legislatures have authority to apply and ratify without gubernatorial intervention. ⁶³ On the other hand, a gubernatorial signature should not invalidate the application.

Other methods, including initiative and referendum, may not displace the methods outlined in Article V, either directly or indirectly.⁶⁴ Thus, a referendum

⁶¹ Opinion of the Justices, 107 A. 673; *Prior*, 188 P. 729; Decher v. Sec'y of State, 177 N.W. 288 (Mich. 1920); *Hawke I*, 253 U.S. 221; *see also Hawke II*, 253 U.S. 231; *Dyer*, 390 F. Supp. at 1306 (referring to power of Article V assembly to establish its own rules); Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), *judgment vacated as moot sub nom*. Carmen v. Idaho, 459 U.S. 809 (1982).

⁶² Hollingsworth, 3 U.S. 381; Opinion of the Justices, 107 A. 673.

Natelson, *Rules*, at 710–12; Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977); see also Opinion of the Justices, 673 A.2d 693 (Me. 1996) (stating that a governor has no delegated power under Article V).

⁶⁴ Prior v. Norland, 188 P. 729 (Colo. 1920); *Hawke I*, 253 U.S. 221; *see also Hawke II*, 253 U.S. 231; *Sevier*, 62 S.W.2d 895. This is so, although references to the state legislature in other parts of the Constitution may include the referendum power. Ohio *ex rel*. Davis v. Hildebrant, 241 U.S. 565 (1916) (construing the Times, Places and Manner Clause); Smiley v. Holm, 285 U.S. 355 (1932)

may not ratify in lieu of the state legislature⁶⁵ or state convention,⁶⁶ nor may initiatives, referenda, or state constitutional or legal provisions be employed to coerce the state legislature or other Article V assemblies.⁶⁷ An Article V assembly is a deliberative assembly, both at the ratification stage⁶⁸ and at the proposal stage,⁶⁹ and, in the words of Justice Brandeis, its function "transcends any limitations sought to be imposed by the people of a state."⁷⁰ A court will not countenance "an unconstitutional attempt effectively to remove the Article V power from legislators and place it in the hands of the people, thus substituting popular will for the will of the independent 'deliberative assemblage' . . . envisioned by the Framers of the Constitution."⁷¹ However, the courts do permit advisory referenda on Article V

(stating that the constitutional meaning of "legislature" depends on the function, and that it can refer to a lawmaking, ratifying, electing, or consenting body; of course, it may also mean an applying body); State *ex rel*. Harper v. Waltermire, 691 P.2d 826 (Mont. 1984) (dicta).

⁶⁵ Hawke I, 253 U.S. 221; see also Hawke II, 253 U.S. 231; State ex rel. Donnelly v. Myers, 186 N.E. 918 (Ohio 1933).

⁶⁶ Opinion of the Justices, 167 A. 176 (Me. 1933)

AFL-CIO v. Eu, 36 Cal. 3d 687 (1984); Waltermire, 691 P.2d 826 (dicta); League of Women Voters v. Gwadosky, 966 F. Supp. 52 (D. Me. 1997); Donovan v. Priest, 931 S.W.2d 119 (Ark. 1996); Barker v. Hazetine, 3 F. Supp. 2d 1088 (D.S.D. 1998); Morrissey v. State, 951 P.2d 911 (Colo. 1998); In re Initiative Petition 364, 930 P.2d 186 (Okla. 1996); Gralike v. Cooke, 191 F.3d 911 (8th Cir. 1999), aff'd on other grounds, 531 U.S. 510 (2001); Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999); Bramberg v. Jones, 978 P.2d 1240 (1999). But see Opinion of the Justices, 148 So. 107 (Ala. 1933) (a state law may require convention delegates to vote in accordance with the results of a referendum). As the cases cited here demonstrate, this holding has been repudiated everywhere.

⁶⁸ Opinion of the Justices, 167 A. at 180.

⁶⁹ Donovan v. Priest, 931 S.W.2d 119 (Ark. 1996); see also Waltermire, 691 P.2d 826 (dicta); Opinion of the Justices, 673 A.2d 693 (Me. 1996); Gwadosky, 966 F. Supp. 52; Barker, 3 F. Supp. 2d 1088; Morrissey, 951 P.2d 911; In re Initiative Petition 364, 930 P.2d 186; Gralike, 191 F.3d 911; Miller, 169 F.3d 1119; Bramberg, 978 P.2d 1240.

⁷⁰ Leser v. Garnett, 258 U.S. 130, 137 (1922); see also Trombetta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973) (holding that under *Leser* a state constitution may not impair a state legislature in its ratification function).

⁷¹ *Miller*, 169 F.3d 1119.

questions.⁷²

Moreover, in the one case in which state conventions ratified a constitutional amendment, those conventions—although not actually coerced—acted less as deliberative bodies than as registers of the popular will.⁷³ As ratification bodies, however, they were limited to a "yes" or "no" vote; a convention for proposing amendments is not.

Article V assemblies enjoy powers incidental to those expressly granted by Article V.⁷⁴ The rule barring coercion of an Article V assembly in the exercise of its express powers should also apply to an incidental power, such as establishing its own rules or electing its own officers. Those matters may not, therefore, be dictated by a state's constitution or by its law or by legislative procedures adopted for other circumstances. A court may, however, find that an Article V assembly has impliedly adopted such a pre-existing rule.⁷⁵

§ 3.8. The State Legislatures' Applications

§ 3.8.1. Background

In Founding-Era practice, a state legislature, a prior convention, or Congress could invite states to send commissioners to a federal convention. The invitation usually was labeled the *call*, but sometimes an *application*. ⁷⁶

The Framers standardized both vocabulary and usage. Article V denotes the actual invitation as the call, and provides that it may be issued only by Congress. Article V denotes the petition to Congress as an application and provides that it

⁷² Kimble v. Swackhamer, 439 U.S. 1385 (1978) (Rehnquist, J.) (upholding advisory referendum); Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997).

⁷³ Brown, *Ratification*, at 1017.

⁷⁴ State *ex rel*. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933).

⁷⁵ Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.) (holding a state legislative voting rule not binding on, but impliedly accepted by, the legislature operating under Article V).

⁷⁶ For an example of the term "application" being used as a synonym for "call," see Natelson, *Conventions*, at 642 (reproducing a letter from the then-president of Massachusetts leading to the 1776–1777 Providence Convention).

may be issued only by a state legislature. However, when two-thirds of the states have applied on the same topic, Congress must call the convention to deal with that topic; Congress has no discretion in that matter.

§ 3.8.2. What Is an Application and How Is It Adopted?

An application is a resolution of a state legislature formally requesting Congress to call a convention for proposing one or more amendments.⁷⁷ The resolution may include statements of purpose (preambles or "whereas" clauses), but need not do so.

Article V grants power to make application to the state legislatures alone.⁷⁸ Neither the state constitution, state laws, nor normal legislative procedures are binding on the legislature when it acts under Article V.⁷⁹ If, however, the legislature does follow those procedures, a court may rule that the legislature has assented impliedly to them.⁸⁰

Generally, bicameral state legislatures have adopted applications by individual chambers successively voting for the same resolution. However, the legislature may decide to vote on applications in a joint session. Similarly, the legislature may require a supermajority vote to adopt an application. In the absence of a decision to do so, action is by a majority of those present and voting, assuming a quorum.⁸¹

Applications may be adopted only pursuant to the grant of power in Article V. That grant is to the state legislature as an Article V assembly, not to the state

⁷⁷ Natelson, *Rules*, at 709–10.

⁷⁸ See supra § 3.6.

⁷⁹ See supra § 3.7.

⁸⁰ Dyer, 390 F. Supp. 1291.

⁸¹ Ohio *ex rel*. Erkenbrecher v. Cox, 257 F. 334 (S.D. Ohio 1919) (dicta); *cf*. Rhode Island v. Palmer ("The Prohibition Cases"), 253 U.S. 350 (1920) (the requirement that "two thirds" of each house of Congress propose amendments means two-thirds of the members present, assuming a quorum).

itself.⁸² There is no formal role in the process for either the governor or for the people acting through initiative or referendum.⁸³ Purely advisory initiatives and referenda are permitted.⁸⁴

Although it is wise to provide for certain formalities after adoption, such as transmission to other states, no formalities are required for the application to be valid other than that mentioned in the Constitution⁸⁵—i.e., transmission to Congress. Generally, official state certification that an application has been passed precludes congressional and judicial investigation into the appropriateness of the process adopted.⁸⁶

§ 3.8.3. State Legislatures May Limit Their Applications to a Single Subject.

The normal practice of political bodies suggests power to define the scope of their resolutions. There should be, therefore, a presumption that a state legislature may apply for a convention to consider only certain topics rather than be required to apply only for an unlimited convention.⁸⁷ Nevertheless, during the 1960s and 1970s various legal writers (predominantly those opposing a convention) argued that all

⁸² See supra § 3.6.

⁸³ See supra § 3.7; see also Natelson, Rules, at 710–12.

⁸⁴ See supra § 3.7.

⁸⁵ Cox, 257 F. 334 (no requirement for validity of a ratification other than mentioned in Constitution); United States *ex rel*. Widenmann v. Colby, 265 F. 998 (D.C. Cir. 1920), *aff'd*, 253 U.S. 350 (1921).

⁸⁶ Cox, 257 F. 334; Colby, 265 F. 998; Field v. Clar, 143 U.S. 649, 669–73 (1892) (holding that evidence that bill was signed by the Speaker of the House and President of the Senate and enrolled was conclusive that it was duly passed); Leser v. Garnett, 258 U.S. 130 (1922) (holding that official notice by state legislatures that they had ratified bound the U.S. Secretary of State, whose certification was binding on the courts); Idaho v. Freeman, 529 F. Supp. 1107, 1150 (D. Idaho 1981), judgment vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982).

⁸⁷ Cf. Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977) (holding that a single-subject application is valid, although not dealing with the issue as to whether the limitation is enforceable).

conventions must be unlimited. Some even contended that limited applications were void by reason of their limits.

These contentions were made on very slender evidence, and subsequent research has discredited them. 88 Founding-Era practice, upon which the Constitution's amendment convention was based, was to limit in advance the topic and scope of multi-government conventions. 89 Discussions from the Founding Era reveal a universal assumption that applications would be made to promote amendments addressing prescribed problems. 90 The first application ever issued, that of Virginia in 1788, 91 was arguably limited as to subject, and hundreds of later applications have been limited as well. 92 Indeed, the central purpose of the state application and convention procedure—to grant state legislatures parity with Congress in the proposal process—would be largely defeated unless those legislatures had the same power Congress does to define an amendment's scope in advance.

It follows also from historical practice, not to mention common sense, that Congress should aggregate together towards the two-thirds threshold only those applications that address the same general topic.

The limits on the ability of the convention to "run away"—that is, exceed the scope of the applications and call—is not within the present scope of this work. Suffice to say that no prior American inter-governmental conventions have run away, and contrary to some claims, this is also true of the 1787 Constitutional Convention.⁹³ There are numerous and redundant legal checks on an Article V

⁸⁸ See, e.g., Rappaport, Limited Convention; Stern, Reopening.

⁸⁹ See generally Natelson, Conventions.

⁹⁰ Natelson, Rules, at 723–31; Rappaport, Limited Convention, at 83–89 (2012); Stern, Reopening, at 771.

 $^{^{91}}$ This application is substantially reproduced in Natelson, Rules, at 739, along with its unlimited New York counterpart.

 $^{^{92}}$ Natelson, Rules, at 731-32.

⁹³ See generally Natelson, Conventions. On the Constitutional Convention, see *id.* at 674; Natelson, Rules, at 719–23.

§ 3.8.4. Application Format, Conditions, and Subject Matter

An application should be addressed to Congress. It should assert specifically and unequivocally that it is an application to Congress for a convention pursuant to Article V. The resolution should not merely request that Congress propose a particular amendment, nor should it merely request that Congress call a convention. An example of effective language is as follows:

The legislature of the State of _____ hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the Constitution of the United States that [here state general topic for convention].

The application form proposed by Citizens for Self-Governance is set forth in the Forms section of this book.⁹⁵ This form includes a preamble in a set of "whereas" clauses.

Conditions on applications may or may not be valid, depending on the nature of the condition. However, they are not recommended. Besides the fact that a court may declare a condition invalid, there is a risk that conflicting conditions among state applications otherwise covering the same subject may prevent Congress from aggregating them toward the two-thirds threshold. There is also the risk that conditions may be seen as coercing Congress or the convention in a

⁹⁴ ROBERT G. NATELSON, PROPOSING CONSTITUTIONAL AMENDMENTS BY A CONVENTION OF THE STATES: A HANDBOOK FOR STATE LAWMAKERS 17–18 (Am. Legislative Exch. Council, 2d ed. 2013) [hereinafter NATELSON, HANDBOOK], available at http://www.alec.org/wp-content/uploads/article-five-handbook-1.pdf; see also Rappaport, Limited Convention, at 81–82; Stern, Reopening, at 781–87.

⁹⁵ Infra § 5.1.

⁹⁶ Conditional applications and calls were recognized during the Founding Era. *See, e.g.*, Natelson, *Conventions*, at 639, 661–62; *cf.* Idaho v. Freeman, 529 F. Supp. 1107, 1154 (D. Idaho 1981), *judgment vacated as moot sub nom.* Carmen v. Idaho, 459 U.S. 809 (1982) (declining to rule on the issue while criticizing the claim that conditions are void or void an application).

manner not permitted by Article V.

As noted above, single subject applications are almost certainly valid and enforceable. The same cannot be said for applications that purport to dictate to the convention specific amendment wording. The courts and Congress may, with some justification, see them as invalid because they interfere with the normal discretion afforded to a proposal convention. To the extent that specific wording varies among applications, it also will impede congressional aggregation toward the two-thirds threshold. Although some scholars believe applications mandating specific wording are constitutionally valid, legal issues and potential aggregation problems place them in doubt.

§ 3.8.5. State Legislatures May Rescind Applications.

Some have argued that states cannot rescind applications, and that once adopted an application continues in effect forever, unless a convention is called. In part, this is based on judicial deference to congressional suggestions that a *ratification* cannot be rescinded. 97 However, the position that applications cannot be rescinded is contrary to the principles of agency the Founders incorporated into the process. An application is a deputation from the state legislature to Congress to call a convention. Just as one may withdraw authority from an agent before the interest of a third party vests, so may the state legislature withdraw authority from Congress before the two-thirds threshold is reached. 98

This theoretical conclusion is consistent with traditional multi-government convention practice. The power of a state to rescind its resolutions, offers, and ratifications was well-established by the time Article V was adopted, ending only when the culmination of a joint process was reached. The historical record contains

⁹⁷ Opinion of the Justices, 107 A. 673 (Me. 1919); Coleman v. Miller, 307 U.S. 438 (1939) (stating that congressional decisions against rescission will be respected). *But see Freeman*, 529 F. Supp. at 1141 (noting that Congress has not come to a definitive conclusion on rescission of ratifications).

⁹⁸ Natelson, *Rules*, at 712; *Freeman*, 529 F. Supp. 1107 (holding that ratifications can be rescinded until three fourths minimum is reached).

§ 3.8.6. Unrescinded Applications Do Not Grow "Stale" with the Passage of Time. 100

Some have argued that applications automatically become "stale" after an unspecified period of time, and no longer count toward a two-thirds majority. However, there is no evidence from the Founding Era or from other American practice implying that applications become stale automatically, or that Congress can declare them to be so. On the contrary, during the constitutional debates, participants frequently noted with approval the Constitution's general lack of time requirements in the amendment process. Moreover, the ministerial nature of the congressional duty to call a convention and Congress's role as the agent for those legislatures in this process, suggests the opposite. Time limits are for principals, not agents, to impose. Therefore, if a state legislature believes its application to be stale, that legislature may rescind it.

This argument that applications become stale traditionally has been buttressed by a 1921 Supreme Court case, *Dillon v. Gloss*, ¹⁰¹ which suggested that *ratifications*, to be valid, must be issued within a reasonable time of each other. Of course a rule pertaining to ratifications does not necessarily pertain to applications, and this was certainly true of the rationale behind the *Dillon* court's statement. ¹⁰² Moreover, subsequent events have removed the prop for that statement, even as to ratifications: The *Dillon* language was predicated upon the court's doubt that

⁹⁹ E.g., Natelson, Conventions, at 666.

 $^{^{100}}$ This section is based largely on Natelson, Rules, at 712–14, but also includes new information.

¹⁰¹ 256 U.S. 368 (1921).

¹⁰² The "staleness" discussion in *Dillon* was based partly on presumed congressional power to set ratification time limits as an incident of its power to choose one of two "Mode[s] of Ratification." However, congressional authority to call a convention for proposing amendments is narrower than its authority over ratification: The latter is partly discretionary, the former is purely ministerial.

proposed amendments could survive a very long ratification period. ¹⁰³ That doubt was dispelled, however, by the universally-recognized adoption of the Twenty-Seventh Amendment, based on ratifications stretching over two centuries. In any event, the courts have edged away from the "staleness" rationale of *Dillon*. ¹⁰⁴

An additional factor against the "staleness" contention is that there is no appropriate umpire—other than the issuing state legislature—to judge the issue. It is not resolvable by the courts for lack "judicially manageable standards," ¹⁰⁵ and for Congress to judge would be to invite abuse by interjecting that body into a process designed to bypass it. Thus, in the final analysis, the only proper judge of whether an application is fresh or stale is the legislature that adopted it. Any time a legislature deems an application (or ratification) to be outdated, the legislature may rescind it, as many have done.

§ 3.9. The Congressional Call

Details of the congressional call are outside the current scope of this work. For present purposes, it suffices to say that congressional calling power is confined to setting the time and place for the convention with perhaps a few administrative

¹⁰³ *Dillon*, 256 U.S. at 375.

of ratification, but the text of the amendment indicates that the limit was part of the original proposal itself. See United States v. Thibault, 47 F.2d 169, 169 (2d Cir. 1931) (reproducing the amendment's text). Since Dillon, the courts have corrected the basis on which the congressionally imposed seven-year ratification limit was justified. Thus, in Coleman v. Miller, 307 U.S. 438, 454 (1939) the Court stated that "We have held that the Congress in proposing an amendment may fix a reasonable time for ratification." See also United States v. Gugel, 119 F. Supp. 897, 900 (E.D. Ky. 1954) (stating that time for ratification is not important "unless a period of limitation is fixed by the Congress in the act submitting the amendment to the states"—that is, in the proposal). In Idaho v. Freeman, 529 F. Supp. 1107, 1153 (D. Idaho 1981), judgment vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982), the court reported the original Dillon rationale, but noted that the time period in the proposed amendment before it was part of the congressional proposal itself.

¹⁰⁵ Coleman, 307 U.S. 438 (holding that there are no judicial standards for determining what time is reasonable); Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.).

details. Note the following:

- In issuing the call, Congress is acting not as a legislature nor as an arm of the United States, ¹⁰⁶ but as an Article V assembly whose power is limited to that received under Article V.
- The Necessary and Proper Clause of the Constitution does not apply in this setting, as some writers have claimed. That Clause applies only to Congress in its capacity as a legislature and pertains to other "officers" and "departments" of the "Government of the United States." No Article V assemblies fit within that category. 108
- In issuing the call, Congress acts as an agent of the states, and as such must treat the states equally.
- Congress's duties as an agent are ministerial rather than discretionary, although it may have to exercise threshold discretion when aggregating applications by subject matter.¹⁰⁹
- Congress has no choice but to issue the call once the two-thirds threshold has been reached.
- The scope of any congressional power incidental to the call is very limited. For example, the method of choosing convention commissioners is within the authority of the state legislatures; voting at the convention is by a "one state, one vote" suffrage rule, unless the convention decides the

¹⁰⁶ United States v. Sprague, 282 U.S. 716, 733 (1931) ("The fifth article does not purport to delegate any governmental power to the United States On the contrary . . . the article is a grant of authority by the people to Congress, and not to the United States.").

¹⁰⁷ U.S. CONST., art. I, § 8, cl. 18.

¹⁰⁸ Cf. Sprague, 282 U.S. 716, 733 (1931). Similarly, the state legislatures are not departments of the U.S. government.

Ministerial duties and constitutional rules, even on Congress, are enforceable by the courts. *Cf.* Powell v. McCormick, 395 U.S. 486 (1969) (issuing a declaratory judgment for reinstatement of member of Congress denied his seat).

¹⁰⁹ Cf. Roberts v. United States, 176 U.S. 222 (1900) (holding that threshold discretion as to construction of law does not alter ministerial nature of the duties).

contrary; and authority to elect convention officers and adopt convention rules is the prerogative of the convention. Those matters are therefore not within the power of Congress. Not only is the limited scope of congressional authority clear from the relevant history, but it is the only approach consistent with the primary purpose of the convention procedure as a way to bypass Congress.

§ 3.10. Selecting Commissioners

At the convention, each participating state is represented by a "committee" (delegation) of commissioners (delegates). When Article V was adopted, the nearly-universal procedure was for the state legislatures to determine the method for selecting commissioners. (Exceptions were limited to instances when the selection had to be made during the legislative recess.) This practice continued for subsequent conventions as well. Article V indirectly confirms that the method of delegate selection is a prerogative of the state legislature by granting application power to state legislatures, in their capacity not as branches of state government but as Article V assemblies.

During the Founding Era, the legislature usually opted to select the commissioners itself. Among the fifty-five commissioners at the 1787 Constitutional Convention, for example, fifty-four were legislative selections. The sole exception was James McClurg of Virginia. Governor Edmund Randolph designated Dr. McClurg, a noted physician, pursuant to legislative authorization after the legislature's original choice, Patrick Henry, refused to serve. 112

A bicameral legislature may choose to elect by joint vote of both houses, or by seriatim votes. As the McClurg example suggests, however, the legislature may choose a different selection method. During the Founding Era, state legislatures occasionally delegated the choice to the executive or to a legislative committee. A

¹¹⁰ See infra § 3.14.

¹¹¹ See generally Natelson, Conventions.

^{112 3} FARRAND'S RECORDS 562-63.

number of states attending the 1861 Washington Conference Convention permitted the governor to nominate commissioners, subject to state senate approval, and commissioners to the 1922 Santa Fe convention all were selected by state governors pursuant to legislative authorization.

In theory, a state legislature could devolve election of commissioners upon the people, voting at large or in districts. This would unprecedented, however, and probably unwise. The commissioner's job is primarily filled with diplomatic and drafting duties, with basic policy decisions left in the commissioning legislature. The text, history, and applicable case law strongly suggest that the commissioner is also subject to legislative rather than popular instruction. Direct election could create conflicts of interest in that regard. It is even conceivable that, based on Article V case precedent, the courts might not permit direct election. 113

§ 3.11. Empowering Commissioners

As their name indicates, commissioners are empowered by a document usually called a *commission*, although the term *credentials* is also used. ¹¹⁴ The commission includes the name of the commissioning authority (in this case, the state legislature or its designee), the name of the commissioner, the method of selection, the assembly to which the commissioner is being sent, and language granting power to the commissioner and defining the scope of that power. When the convention opens, commissioners are expected to present their credentials, usually to a credentials committee, for review. Several forms from prior conventions are included in Part IV. ¹¹⁵

§ 3.12. Instructing and Supervising Commissioners

In prior federal conventions, state officials issuing commissions often

¹¹³ Dodge v. Woolsey, 59 U.S. 331, 348 (1855) (stating that the people "have excluded themselves from any direct or immediate agency in making amendments").

¹¹⁴ See generally Natelson, Conventions.

¹¹⁵ Infra § 4.3.

supplemented them with additional written instructions.¹¹⁶ Unlike the commissions, these instructions customarily were secret in order to preserve diplomatic and negotiating leverage. The instructions defined the commissioner's authority with greater precision and informed him what measures he could or could not consider, and what goals to seek. Form instructions are included in Part IV.¹¹⁷

§ 3.13. "No Runaway" Acts and Similar Laws

Several states have adopted, or considered, measures designed to further minimize the negligible chance that a convention for proposing amendments might exceed its authority. Such measures are not enforceable to the extent they attempt to dictate the structure of the legislature's applications, how it selects its commissioners, and when they may recall them. They also are not enforceable to the extent that they attempt to control the convention's discretion within the scope of its authority. Provisions imposing civil or criminal penalties on commissioners who clearly abuse their trust probably are valid, however. Even insofar as they are technically invalid, they may serve an educational function, and if an Article V assembly (usually in this case a state legislature) voluntarily operates under them, that assembly may be deemed to have accepted them. 120

§ 3.14. Convention Rules¹²¹

§ 3.14.1. The Legal Environment

As discussed in Section 3.5, the courts rely heavily on historical practice

¹¹⁶ E.g., Natelson, Conventions, at 631, 636, 638, 658, 663, 679, 687.

¹¹⁷ Infra § 4.4.

¹¹⁸ See supra § 3.7.

¹¹⁹ See supra § 3.7.

¹²⁰ Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (Stevens, J.) (holding that Article V legislature impliedly adopted provisions of state constitution).

¹²¹ The author would like to thank the seasoned lawmakers and other experts who contributed insights into the convention rules process. In the treatment that follows, these people sometimes are referred to as our "advisors."

when interpreting the words of Article V. This is true both of the Supreme Court¹²² and lower courts.¹²³ The history relied on by the courts includes both the period up to the time the Constitution was ratified and practice subsequent to ratification.

Prominent in historical practice—both before and after the Constitution's adoption—has been the uniform and exclusive prerogative of Article V assemblies to adopt their own rules. ¹²⁴ Shortly before he ascended to the Supreme Court, Justice John Stevens, writing for a three-judge federal panel, explicitly recognized this prerogative. ¹²⁵ The prerogative further extends also to the right of a convention to judge the credentials of its delegates. ¹²⁶ Occasional suggestions that Congress could impose rules on an Article V convention are not well-founded, either in history or law. ¹²⁷

The prerogative of conventions to establish their own rules does not mean that each convention acts on a blank slate. Far from it. Many, if not most, multistate conventions have borrowed their written rules from prior multi-state conventions and from legislative bodies. For example, the rules employed by the Washington Conference Convention of 1861 derived substantially from those

¹²² Hawke v. Smith, 253 U.S. 221 (1920); Leser v. Garnett, 258 U.S. 130 (1922); United States v. Sprague, 282 U.S. 716 (1931); see also Hollingsworth v. Virginia, 3 U.S. 381 (1798) (following procedure in adopting first ten amendments); supra § 3.5.

¹²³ See supra § 3.5; see also Paul Mason, Mason's Manual of Legislative Procedure § 39-6 (Nat'l Conference of State Legislatures, 2010 ed.) [hereinafter Mason's Manual] ("The best evidence of what are the established usages and customs is the rules as last in effect.").

¹²⁴ Accord Mason's Manual §§ 2-1, 10-4, 13-7.

¹²⁵ Dyer, 390 F. Supp. at 1306 (referring to power of Article V assembly to establish its own rules); see also MASON'S MANUAL § 71-1.

¹²⁶ Opinion of the Justices, 167 A. 176 (Me. 1933) (ratification conventions pass on the elections of their own members); *accord* MASON'S MANUAL § 560.

¹²⁷ This is an assumption made in Thomas H. Neile, The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress 39 (Cong. Research Serv., Mar. 7, 2014) [hereinafter CRS Report], a paper that shows insufficient understanding of history, recent research, or applicable law. For example, it relies on only two of more than forty reported Article V judicial decisions.

governing the 1787 Constitutional Convention. ¹²⁸ The Nashville Convention of 1850 decided that when one of its own specifically adopted rules did not apply, it would consult Thomas Jefferson's manual of procedure for the United States Senate. ¹²⁹

Convention rules are adaptations of a branch of the Anglo-American common law referred to as *parliamentary law*. ¹³⁰ As the name suggests, parliamentary law owes its origin to the practices of the British Parliament, but over the years it has been refined for use in this country by numerous legislative and judicial precedents. ¹³¹ Parliamentary law applies to both private and public bodies, including legislatures and conventions. ¹³² An example of a rule of parliamentary law is that convention decisions are rendered by a majority of those voting. ¹³³

Although an assembly is free to adopt its own rules, parliamentary law standards govern whenever a specifically adopted rule does not.¹³⁴ In the case of a

Alarmists sometimes demand to know in advance of a convention what the majority necessary for decision will be. A common question is, "Can the convention act by a simple majority vote, or would a two-thirds majority be required, as in Congress, for proposing an amendment?" See NATELSON, HANDBOOK, at 33–34 (reproducing text of alarmists' questions and providing answers).

This question, of course, reveals ignorance of parliamentary common law. Somewhat more surprisingly, a recent Congressional Research Service paper reveals a similar ignorance. *See* CRS REPORT 39 (suggesting that a convention majority of two-thirds would be appropriate).

¹²⁸ Washington Conference Report 19.

¹²⁹ Resolutions, Address, and Journal of Proceedings of the Southern Convention 26 (Harvey M. Watterson ed., 1850) [hereinafter Southern Convention Proceedings]. Jefferson's Manual is now a source for procedure in the U.S. House of Representatives as well. See Thomas Jefferson's Manual, H.R. Doc. No. 111-156 (2011), available at http://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112.pdf.

¹³⁰ MASON'S MANUAL § 44-1.

¹³¹ *Id*. §§ 35, 38.

¹³² Cf. Id. §§ 41, 47.

¹³³ Id. §§ 50-1, 51-6, 510-1, 510-4; see also State of Rhode Island v. Palmer, 253 U.S. 350 (1920); Dyer v. Blair, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (Stevens, J.).

¹³⁴ MASON'S MANUAL §§ 32-4, 37.

convention, parliamentary law controls (1) before adoption of formal rules ¹³⁵ and (2) after adoption of formal rules when none of them resolves an issue. ¹³⁶

Historically, the formal rules adopted by prior multi-state conventions have been less than comprehensive, leaving most matters to be decided by parliamentary law. Fortunately, that law is readily accessible and easy to ascertain: It is collected in *Mason's Manual of Legislative Procedure*, published by the National Conference of State Legislatures. As explained below, we recommend *Mason's Manual* as a source of guidance in absence of a formal convention rule to the contrary.

§ 3.14.2. Historical Resources

Before the Constitution was ratified, colonies and states met in convention over thirty times.¹³⁷ Since ratification, at least four additional conventions of states have met: Hartford (1814), Nashville (1850), Washington, D.C. (1861), and Santa Fe (1922).¹³⁸ The formal rules of several of these gatherings survive, and the journals

¹³⁸ The Santa Fe convention, which negotiated the Colorado River Compact, actually gathered at different times in four different locations, convening at various times in Washington, D.C., Phoenix, and Denver. Most of the meetings, however, including the final and climatic meetings, were held in Santa Fe.

I was unable to find a single, unified, online source of the convention proceedings. I accordingly collected them and posted them at MINUTES AND RECORDS OF THE COLORADO RIVER COMMISSION (1922) [hereinafter COLORADO COMMISSION RECORDS], available at http://constitution.i2i.org/files/2014/01/Minutes-CORiver-Commn.pdf.

There may have been other twentieth century conventions that met to negotiate interstate compacts, although nearly all twentieth century compacts were negotiated more informally. ¹³⁸ One might argue that the four-state Delaware River Basin Advisory Committee, which negotiated the Delaware River Basin Compact in 1959–1960, should be categorized as an additional interstate convention. Because this proposition is contestable, that gathering is not included here. *See* Robert G. Natelson, *A Modern Quasi-Convention of States*, INDEPENDENCE INST. (Mar. 1, 2014), http://constitution.i2i.org/2014/03/01/thea-modern-quasi-convention-of-states/.

¹³⁵ Id. § 39.6.

¹³⁶ *Id*. § 37.1.

¹³⁷ See supra § 3.1.

or proceedings enable us to reconstruct a partial list of rules from many of the others.

The records from the following meetings are helpful: 139

- Albany Congress (1754)
- Stamp Act Congress (1765)
- First Continental Congress (1774)
- First Providence Convention (1776–1777)
- York Town Convention (1777)
- Springfield Convention (1777)
- New Haven Convention (1778)
- First Hartford Convention (1779)
- Philadelphia Price Convention (1780)
- Boston Convention (1780)
- Second Hartford Convention (1780)
- Second Providence Convention (1781)
- Annapolis Convention (1786)
- The Constitutional Convention (1787)
- Third Hartford Convention (1814)
- Nashville Convention (1850) (also called the Southern Convention)
- Washington Conference Convention (1861) (also informally called the Washington Peace Conference)
- Santa Fe Convention (1922) (formally the Colorado River Commission)¹⁴⁰

¹³⁹ Since this is not a law journal article, it avoids extensive citation from these sources. Summaries of all but the last four can be found in Natelson, *Conventions*.

In the text above, I have listed these meetings under their usual or (where available) official names. Many of them had other names, including informal ones. For example, the Boston Convention sometimes was referred to as the "Boston Committee;" and although the first three are now remembered as "congresses," people also applied the word "convention" to them. The term "congress" to describe a multi-state convention fell into disuse after establishment of a permanent U.S. legislature called "Congress."

The rules and protocols followed by these gatherings show far more commonalties than differences. For several reasons, however, the rules and protocols of the Washington Conference Convention of 1861 seem particularly apt: It was our most recent general multi-state convention, 141 and our largest to date. It was, moreover, called for the specific purpose of proposing amendments. Thus, even though the Washington Conference Convention did not operate under Article V, it served as prototype for a duly-called convention for proposing amendments. In several places below, therefore, this section focuses on the rules of the Washington conclave. 142

§ 3.14.3. Formalities before Adoption of Rules

Time and Place

The congressional call specifies the initial time and place of meeting. ¹⁴³ State applications cannot control the initial time and place, although state legislatures may make recommendations on those subjects to Congress. After convening, the assembly assumes control of times and places of meeting. Thus, the convention decides when and for how long to adjourn, and to what place. For example, the Nashville Convention held its initial session in June of 1850, and then adjourned to November of the same year. The Colorado River Commission (Santa Fe Convention) conducted its twenty-seven days of sitting in four different cities: Washington, D.C.,

¹⁴⁰ Although called a "commission," this gathering was a true regional convention of states. It should not be confused with those bodies called "commissions" that operate *after and pursuant to* compacts. The latter represent another form of multi-state cooperation, but their permanent character disqualifies them from being called conventions.

¹⁴¹ A *general convention* is one to which all states, or at least states from all regions, are invited, irrespective of whether all participate. It is to be distinguished from a regional, or partial, convention. *See supra* § 3.1. The term "general convention" does *not* designate an assembly where the subject matter is unlimited, as some have assumed.

¹⁴² Infra § 3.14.4–3.14.5.

¹⁴³ See supra § 3.9.

Phoenix, Denver, and Santa Fe. However, Santa Fe was the site of the last eighteen of the twenty-seven meetings, and of the most important negotiations. 144

Commissioner Selection

A multi-state convention is a gathering of states in their sovereign capacities, and sovereigns may choose their own representatives. Accordingly, selection of state committees is *always* left to the states sending them.¹⁴⁵ The strength of the rule is illustrated by the outcomes of the rare attempts to breach it: Only twice has the calling entity attempted to guide the selection procedure (in 1765 and again in 1780), and on both occasions those efforts were successfully disregarded.¹⁴⁶ In any event, for Congress to dictate how commissioners are selected would radically undercut the fundamental purpose of the convention procedure as a way for the states to bypass Congress.

The selection method most often chosen by state legislatures has been election by the legislature itself, either in joint session or (more often) seriatim by chamber. However, legislatures may delegate the choice to the executive alone or to some combination of executive nomination and legislative approval. The latter methods were employed for many of the commissioners sent to Washington (1861) and to all of them sent to Santa Fe (1922).

¹⁴⁴ For a unified, online collection of the proceedings, see COLORADO COMMISSION RECORDS.

¹⁴⁵ See supra § 3.10.

¹⁴⁶ When the Massachusetts legislature called the 1765 Stamp Act Congress, it asked that other colonies select commissioners through only the lower houses of their legislatures. This was because at the time only the lower chambers were directly elected, while the upper chambers were controlled indirectly by the British Crown. Nevertheless, several colonies chose commissioners in ways other than that recommended, and those commissioners were duly seated. In 1780, the Massachusetts legislature called a convention of five northeastern states. Apparently because some state legislatures were in recess, it asked that commissioners be appointed by those states' official "councils of war." Several states opted to select commissioners by other means, and they also were duly seated. Natelson, Conventions; Natelson, Rules.

Commissioner Credentialing

Each state determines how to commission its own representatives. Early in the convention, each commissioner is expected to present his or her *credentials*—that is, the commission or comparable document showing authority to act on behalf of his state or state legislature. The convention selects a committee that passes on those credentials.

Initial Voting Rules

As noted above, ¹⁴⁷ a convention for proposing amendments is a *convention of states*: a gathering of states in their sovereign, or semi-sovereign, capacities. To the extent the extant records address the issue, they show that conventions of states universally apply the suffrage rule of "one state, one vote." This rule follows from the international law standard that all sovereigns are equal. *The calling entity (which, in the case of an amendments convention, is Congress), may not alter this rule.* ¹⁴⁸

Although at some conventions individual commissioners have been tagged as "members," multi-state conventions never have applied a "one person, one vote" rule. Perhaps this is because, technically, the "members" of the convention are not individual commissioners but state committees. 149

Some multi-state convention journals refer to voting "by ballot," especially for officers and committees. This phrase does not refer to voting per capita, but to a procedure by which individual choices are secret, even within state committees. 150

¹⁴⁷ Supra § 3.2.4.

¹⁴⁸ In 1783 the Massachusetts legislature attempted to break this custom by calling a five-state "one delegate, one vote" convention. The call had to be rescinded when two of the four other states invited refused to attend. Natelson, *Conventions*, at 666.

¹⁴⁹ Cf. MASON'S MANUAL § 52 (providing for equality of the "members" of an assembly).

¹⁵⁰ 1 FARRAND'S RECORDS, at 2 ("The Members then proceeded to ballot on behalf of their respective States—and, the ballots being taken, it appeared that the said George Washington was unanimously elected."); see also id. at 4: ("Mr. Wilson moved that a Secretary be appointed, and nominated Mr. Temple Franklin. Col. Hamilton nominated Major Jackson. On the ballot Majr. Jackson had 5 votes

Votes are still counted by state and state committees voted as units. However, most voting is not by ballot but *viva voce* (Latin for "with live voice"). ¹⁵¹

The tradition at general conventions has been for state-by-state votes to be tabulated in northeast-to-southwest order.

Quorum and Majority Vote

There are two kinds of quorum rules: (1) the number of commissioners who must agree to cast a state committee's vote and (2) the number of states necessary to transact business on the floor. The former is called an *internal quorum rule*. It is determined by the commissioning authority—that is, by each state for its own committee. For example, when New York commissioned its three delegates to the Constitutional Convention, it specified that any two must be present (and agree) to cast the state's vote.

As for the quorum of states necessary on the floor and the margin required for decision, by both common law and court decision a majority of states represented is necessary for a quorum, ¹⁵² and a majority of states voting (a quorum being present) is necessary to decide. ¹⁵³

[&]amp; Mr. Franklin 2 votes."); *id.* at 29 (showing only eight slash marks representing votes). Obviously, since there were several dozen commissioners present, this low vote tally had to reflect the states.

¹⁵¹ MASON'S MANUAL §§ 306-2, 536.

¹⁵² Id. §§ 49-1, 502-1; see also id. § 501-1 ("The total membership of a body is to be taken as the basis for computing a quorum, but when there is a vacancy, unless a special provision is applicable, a quorum will consist of the majority of the members remaining qualified."); accord id § 502-2.

Section 501-2 provides that "The authority that creates a body has the power to fix its quorum." In the case of an amendments convention, however, that authority is the convention, not Congress, which calls it, nor the state legislatures, who apply for it and authorize and create its delegations. The Constitution does not prescribe a quorum, leaving it to the convention.

¹⁵³ Rhode Island v. Palmer, 253 U.S. 350 (1920); Dyer v. Blair, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (Stevens, J.). On majorities as a rule of decision, see also MASON'S MANUAL §§ 50-1, 51-6, 510-1, 510-4.

What Officers Should the Convention Have?

Conventions of states always decide what officers are to govern them. Prior conventions seem to have made this decision pursuant to parliamentary law, before formal rules were adopted.

At the least, every convention has a presiding officer, called the president or chairman, and a secretary, executive secretary, or clerk.¹⁵⁴ Some conventions, especially larger ones, have selected other officers, such as vice president, assistant secretaries, doorkeepers, sergeants-at-arms, and messengers. One former legislator consulted on this project recommended appointment of a parliamentarian.

How Officers Are Chosen.

In prior conventions, the identity of the temporary presiding officer, pending election of a permanent chairman, seems to have been arranged in informal preopening meetings. Although some have suggested that Congress designate a temporary presiding officer in its convention call, no multi-state convention call has ever done this, and an attempt to do so likely would have advisory force only.

At the 1754 Albany Congress, a representative of the Crown was present and became the presiding officer. Since Independence, permanent officers invariably have been elected by the convention itself, generally before adoption of formal rules, pursuant to parliamentary law. To the extent the historical records are complete, they show that all American multi-government conventions have elected officers by a majority vote of state committees. This was true even at the 1922 Colorado River Commission, where a federal representative, Secretary of Commerce Herbert Hoover, was present. Hoover ultimately did serve as chairman, but only after free election by his fellow commissioners, one from each participating state. 155

Before the 1850 Nashville Convention, a preliminary committee decided on

 $^{^{154}}$ MASON'S MANUAL § 584 refers to the secretary, executive secretary or clerk in a legislature as the "chief legislative officer."

¹⁵⁵ Because of Hoover's relief work in World War I and his reputation as an international engineer, his personal prestige at the time was enormous.

nominees for various offices. Although this did not prevent nominations from the floor, the convention did elect the committee's nominees.

The presiding officer always has been elected from among the commissioners rather than from outside the convention. The secretary or clerk usually (but not always) has been a non-commissioner, presumably to better assure impartiality in preparation and preservation of the records. We recommend that state lawmakers consult in advance on preliminary nominations, and that a convention of the states retain the custom of electing a commissioner as the presiding officer and a non-commissioner as secretary or clerk.

How Rules Are Adopted.

Some of the smaller conventions have been comprised of only a handful of commissioners—most of them veterans of government service and/or prior conventions—thereby obviating the need to adopt formal rules. The 1778 New Haven Convention adopted rules, but did not insert them in the journal. The 1922 Santa Fe Convention (Colorado River Commission) seems not to have adopted formal rules, but it did vote on agendas and procedures for each future meeting. ¹⁵⁶ In the absence of formal rules, parliamentary law, essentially as represented by *Mason's Manual*, prevails. ¹⁵⁷ The larger conventions all adopted formal rules and entered them on the journal, although parliamentary law served as a source of default rules. ¹⁵⁸

One of our advisors suggested that an informal committee of state legislative leaders draft proposed rules in advance of the convention, and then try to induce as many state legislatures as possible to agree to them in advance. Whether or not this is done, the final decision on convention rules belongs to the convention itself.

Immediately after election of officers, the convention should choose a rules committee. By modern parliamentary law, committee staffing is the prerogative of

¹⁵⁶ For a unified, online source of this convention's proceedings, see COLORADO COMMISSION RECORDS.

¹⁵⁷ MASON'S MANUAL §§ 32-4, 37.

¹⁵⁸ Default rules are discussed below in Section 3.14.4.

the presiding officer.¹⁵⁹ However, the convention may vote to select the committee itself, ¹⁶⁰ and the historical records suggest that most of the major conventions have done so. In absence of a rule to the contrary, whoever staffs the committee designates the person who chairs it.¹⁶¹

After drafting proposed rules, the committee presents those rules to the floor for debate, adoption, or rejection.

§ 3.14.4. Recommended Rules Not Pertaining to Debate or Decorum

Source of Default Rules

A "default rule" is a rule that applies in absence of an explicit rule to the contrary. For example, in American parliamentary practice, the default rule for making decisions is a majority of those voting. The federal Constitution, or that of a state, or the adopted rules of a public body, can alter a default rule.

It is impractical for a temporary gathering such as a convention of states to adopt rules to address every conceivable situation, and the historical record shows that conventions of states have not attempted to do so. Instead, like legislatures, they adopt discrete rules addressed to particular situations and rely on a common source to supply the gaps. By way of illustration, the default rules for the 1787 Constitutional Convention appear to have been adapted from the procedures of the Confederation Congress. The 1850 Nashville Convention formally acceded to Thomas Jefferson's *Manual of Parliamentary Practice*, which Jefferson drafted for the U.S. Senate when he served as Vice President, and therefore as President of the

¹⁵⁹ MASON'S MANUAL § 600-1.

¹⁶⁰ *Id*. § 600-2.

¹⁶¹ *Id*. § 608.

¹⁶² MASON'S MANUAL § 30-1 ("Most legislative bodies adopt a manual of legislative procedure as the authority to apply in all cases not covered by constitutional provisions, legislative rules, or statutes."); see also id. § 30-2 (stating that resort to manuals by "deliberative assemblies" is permissible).

Senate.

We believe the convention should adopt as a source of default rules *Mason's Manual of Legislative Procedure*. There are several reasons for this.

First, *Mason's Manual* is very comprehensive. Using it as a source of default rules would make it unnecessary for the convention to struggle with such questions as which motions are in order and when, or the vote margin required for reconsideration.

Second, *Mason's Manual* is usable and practical. Not only is it time-tested, but unlike the rules and prior default sources used by earlier conventions, it has been kept up-to-date and consistent with modern technology.

Third, *Mason's Manual* relies on parliamentary common law, and is annotated heavily with legislative and judicial precedents, so the sources and reasoning behind a particular rule are easily discoverable. Fourth, it enjoys wide currency among state legislatures: Seventy of the ninety-nine American state legislative chambers¹⁶³ have adopted it, and there is trend in its direction.¹⁶⁴ Therefore, *Mason's Manual*, or adopted rules based on *Mason's Manual*, are likely to be familiar to a majority of commissioners—most of whom will be chosen by state legislatures and will have had state legislative experience. *Mason's Manual* also will be familiar to any legislative officers or committees assigned to oversee their respective convention delegations. Finally, among those lawmakers we consulted for this project, we found none who was hostile to *Mason's Manual*, and several who were very enthusiastic.

True, *Mason's Manual* was written for state legislatures rather than for conventions. As a practical matter, however, the principal implication of this fact is that certain portions of the manual, such as the portion addressing "Relations with

¹⁶³ See Using Mason's Manual of Legislative Procedure, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/masons-manual-for-legislative-bodies.aspx (last visited Mar. 27, 2014).

 $^{^{164}}$ *Id*.

the Executive" can be safely disregarded. 165

Adoption of *Mason's Manual* would make it unnecessary to craft rules for every occasion. Nevertheless, we believe some explicit rules are called for, as explained below.

Voting by State

All multi-state conventions whose journals disclose a voting rule have proceeded on the basis of one state, one vote. This has been both the default rule and the standard prevailing when conventions adopt explicit standards of suffrage. 166

To understand the reasons for state-by-state voting, it is important to remember that a convention for proposing amendments is not a general legislature, like Congress or a state legislature. Nor is it an instrumentality of any one state. It is, rather, part of a process designed *explicitly* to enable the semi-sovereign states, acting as a group through their legislatures, ¹⁶⁷ to offer ratifiable proposals. James Madison pointed out that the Constitution has both "national" (popular) and "federal" (state-based) features. ¹⁶⁸ The amendments convention, like the U.S. Senate, is a clear example of the latter.

Moreover, the fundamental reason for the convention procedure was to provide the states a way to bypass Congress. ¹⁶⁹ The only entity, other than the convention, that might prescribe an unprecedented voting rule would be Congress. ¹⁷⁰ But allowing Congress to design the convention's voting system would

¹⁶⁵ The two most prominent rivals to *Mason's Manual* also were designed for bodies other than conventions: *Robert's Rules of Order*, and *Jefferson's Manual*.

¹⁶⁶ For example, the rules of the 1861 Washington Conference Convention provided, "Mode of Voting. All votes shall be taken by States, and each State to give one vote. The yeas and nays of the members shall not be given or published—only the decision by States."

¹⁶⁷ See supra § 3.2.4.

¹⁶⁸ THE FEDERALIST No. 39 (James Madison).

¹⁶⁹ See supra § 3.3.

¹⁷⁰ Some have argued that Congress has this power under the Necessary and Proper Clause, but this

undercut the convention's fundamental purpose in a way that the judiciary generally does not sanction. There is no evidence that the one state, one vote rule has been impacted in any way by the "one person, one vote" requirement the modern Supreme Court imposes on general legislative bodies directly representing the people.

Although the application and convention process was not intended to be perfectly democratic, it does accommodate the need for popular consent. The requirement that two-thirds of states, rather than a simple majority, apply for a convention raises the probability of popular consent. The three-quarters ratification requirement virtually assures that any amendment will be approved by a majority (and more likely a supermajority) of the American people.¹⁷¹

There have been occasional attempts in multi-state conventions to challenge or alter the one state, one vote rule, invariably without success. For example, a motion to alter state voting power to reflect population differences was considered at the Nashville Convention. It was recognized that this motion would require assent by a majority of states. The motion was defeated when a majority of states refused to adopt it.¹⁷²

Majority Voting

Approval of motions and proposals by a majority of those voting (in this case, a majority of states) is the prevailing rule under parliamentary law and prior convention practice. The convention may, if a majority of state committees wishes, alter the rule. The Santa Fe Convention (Colorado River Commission) decided on a unanimity requirement among states for most purposes. The reason, apparently, was that the group was negotiating an interstate compact, the compact would not

is inaccurate. See supra § 3.9.

¹⁷¹ NATELSON, HANDBOOK, at 22.

¹⁷² SOUTHERN CONVENTION PROCEEDINGS, at 27. Similarly an effort in 1783 by the Massachusetts legislature to call a one delegate, one vote convention failed because states refused to participate. Natelson, *Conventions*, at 666.

be binding on any state that rejected it, and the compact might be useless unless all states consented.

The unanimity requirement at the Santa Fe meetings worked tolerably well, but there were only eight commissioners, and dissenters occasionally voted "yes" so as not to obstruct the progress of the negotiations. Even at Santa Fe, late in the proceedings the unanimity rule was changed temporarily to majority consent for most purposes.

A unanimous voting rule clearly would not be appropriate at a general convention, with far more states involved. We recommend that amendments conventions decide substantive and procedural questions by a majority of states voting, a quorum being present.

Quorum

Traditionally, a quorum is a majority of eligible voters (states), ¹⁷³ and this rule seems to have been followed for most multi-state conventions. For example, the 1787 Constitutional Convention adopted a quorum of seven—that is, a majority of state committees—with decisions to be made by a majority of a quorum. On the other hand, the Washington Conference Convention adopted a quorum of only seven states when twenty-one were present. In absence of unforeseen circumstances, we do not recommend departing from the majority rule. However, any future convention of states should provide, as prior multi-state conventions have, that if a quorum is not present, those states that are represented should have power to adjourn from day to day.

Prayers and Oaths

Some conventions have been introduced with prayers, generally before the daily session. For example, the rules of the Hartford Convention of 1814 prescribed that "[t]he meetings of this Convention shall be opened each morning, by prayer,

¹⁷³ MASON'S MANUAL § 500-2.

which it is requested may be performed, alternately, by the Chaplains of the Legislature of Connecticut, residing in the city of Hartford." Even the modern Congress has decided that prayer can have an uplifting effect on the proceedings.

On the other hand, the most successful American multi-state convention in history—the one that drafted the Constitution—made no provision for institutionalized prayer.

We have a preference for an initial prayer, led in turn by representatives of a wide range of faiths and denominations. However, prayer is not an objective that should be pursued if it proves divisive, since, of course, individual commissioners and committees can make their own arrangements if they wish.

The Albany Congress administered an oath to its secretary, presumably to record the proceedings honestly. Oaths of fidelity are routinely administered to American public officers, and we see no reason why a convention should not do so as well.

Kinds of Committees

A convention may decide to create any committees relevant to its mission. Typically, conventions create committees to review credentials, committees to draft language, and committees to negotiate differences. If the gathering is called under the Convention of States application, it will have to address a range of subjects, including term limits, fiscal responsibility, and amendments narrowing or clarifying the jurisdiction of the federal government. In that case, the convention may opt to create a committee to develop amendment language addressing each subject.

Committee Staffing

Under modern parliamentary common law, the presiding officer staffs committees, as did the president of the 1814 Hartford Convention. An assembly may, however, provide for election instead. A rule of the 1787 Constitutional Convention specified:

That Committees shall be appointed by ballot; and that the members

who have the greatest number of ballots, although not a majority of the votes present, be the Committee. When two or more Members have an equal number of votes, the Member standing first on the list in the order of taking down the ballots shall be preferred.

Note that under this rule election was by a plurality rather than a majority.

There seems to be no reason to go through the trouble of electing members to all committees, but election may be appropriate for major areas of responsibility, such as rules and intra-convention negotiation.

Secrecy

Those conventions addressing the issue appear to have applied a rule of secrecy. A principal purpose was to allow commissioners to think aloud, debate freely, and change their minds without losing face. For example, the rules of the First Continental Congress provided that, "the doors be kept shut during the time of business, and that the members consider themselves under the strongest obligations of honour, to keep the proceedings secret, untill [sic] the majority shall direct them to be made public." The 1861 Washington Conference Convention prescribed that "[t]he yeas and nays of the members shall not be given or published—only the decision by States."

Similarly, the rules of both the Constitutional and Washington Conference Conventions specified that "no copy be taken of any entry on the journal during the sitting of the House without leave of the House," and that "members only be permitted to inspect the journal." The rules of the Constitution Convention admonished that "nothing spoken in the House be printed, or otherwise published or communicated without leave."

Our advisors were unanimous in believing that such secrecy would not be publicly acceptable today. *Mason's Manual*, accordingly, includes no such rules. Advocates of secrecy may be comforted by the realization that, although secrecy has some procedural advantages, disclosure offers some offsetting advantages (in addition to public acceptance). Among these advantages is the greater ability of

legislative authorities to ensure that their commissioners remain within their instructions and remain connected with political realities.

Obviously, openness does not justify chaos: The convention will have to adopt rules assuring that its proceedings are not disrupted by outsiders. But this is no more than any modern legislative body must do. 174

Minutes

All conventions direct the secretary, either personally or through a convention-authorized assistant, to record the minutes necessary for entry in the official journal. A 1787 Constitutional Convention rule specified that, "Immediately after the President shall have taken the Chair, and the members their seats, the minutes of the preceding day shall be read by the Secretary."

Number of Commissioners on the Floor

Informal discussions among state legislative leaders prior to a convention may lead to agreed limits on the size of any one state's committee. Based on a study of the historical record, we believe that a cap of five commissioners per state would be appropriate. Ultimately, the size of a state's committee is a matter for that state's legislature to determine.

It is possible that non-cooperative states may, if they do not boycott the convention, ¹⁷⁵ opt to send oversized delegations. They may do so as a measure of protest, as a populist gesture, or as a way of skewing debate in their favor. An historical illustration is the decision of Tennessee to send 100 commissioners to the Nashville Convention, when all the remaining states collectively sent only seventy-five. The presence of over-sized committees does not change the one state, one vote rule (which, in fact, survived a challenge at Nashville), but the situation could present problems of crowding and fairness.

¹⁷⁴ MASON'S MANUAL § 705-3 (providing that a legislative body has absolute control of its chambers).

¹⁷⁵ For example, Rhode Island objected to the 1787 Constitutional Convention, and refused to send commissioners. No multi-state convention has included committees from every single state.

One way of forestalling this problem without impairing the prerogative of a state to govern its own committee is to adopt a convention rule limiting the number of commissioners from any one state who may participate in any given debate or appear on the floor at one time. One of our advisors suggested a limit on the amount of floor time that may be used on any day by any state committee.

§ 3.14.5. Rules of Debate and Decorum

Several of the major multi-state conventions have adopted rules of debate and decorum specific to their needs. Notable among these are the standards applied at the Washington Conference Convention of 1861, which were based largely, although not entirely, on the rules of debate and decorum in more famous conclave in Philadelphia in 1787.¹⁷⁶ For reasons mentioned earlier, ¹⁷⁷ the Washington Convention rules are worth examining in some detail. Listed below are the principal rules together with commentary that may be helpful in adapting them to modern needs. ¹⁷⁸

Order of Business

The Washington Convention prescribed that (1) "[i]mmediately after the President shall have taken the chair, and the members their seats, the minutes of the preceding day shall be read by the Secretary" and that (2) "[o]rders of the day shall be read next after the minutes, and either discussed or postponed, before any other business shall be introduced."

Commentary: Mason's Manual sets forth a somewhat different order.¹⁷⁹ If we disregard the items on Mason's list relevant to a legislature but not to a convention, we are left with the following: (1) call to order, (2) roll call, (3) invocation, (4) reading and approval of the journal of the previous day, (5) reports of standing

¹⁷⁶ WASHINGTON CONFERENCE REPORT, at 19.

¹⁷⁷ Supra § 3.14.2.

¹⁷⁸ All the rules of that convention are not treated here—only those on debate and decorum.

¹⁷⁹ MASON'S MANUAL § 710.

committees, (6) reports of special or select committees, (7) special orders, (8) unfinished business, (9) introduction and first reading of proposals, (10) consideration of daily calendar, (11) announcement of committee meetings, and (12) adjournment.

Focus of the Convention

Another rule of the Washington Convention provided as follows: "Every member, rising to speak, shall address the President; and while he shall be speaking none shall pass between them, or hold discourse with another, or read a book, pamphlet, or paper, printed or manuscript; and of two members rising to speak at the same time, the President shall name him who shall first be heard."

Commentary: Addressing the presiding officer is in accord with modern practice. ¹⁸⁰ The presiding officer's obligation to select the person rising earlier, and to choose between those rising at the same time, also is consistent. ¹⁸¹ The proscription on reading extraneous matter may seem alien in a time of universal multi-tasking, particularly with tablet computers and smartphones; but there is something to be said for requiring commissioners to direct their attention to the debate. If, however, written motions are to be disseminated instantly, commissioners should have receiving devices available. If computers are used for that purpose, then preventing commissioners from reading unrelated matter on them may be impractical.

Frequency and Length of Speaking

"A member shall not speak oftener than twice, without special leave upon the same question; and not a second time before every other who had been silent shall have been heard, if he choose to speak upon the subject."

Commentary: The two-time rule had been used in the First Continental

¹⁸⁰ *Id*. §§ 91-2, 110-1.

¹⁸¹ *Id*. § 91-3(a), (b).

Congress of 1774 and in other fora, and its success argues for emulation. *Mason's Manual* provides that a person may speak only once on a question at the same stage of procedure on a given day, and sometimes even on different days. ¹⁸²

We found no multi-state any convention that limited the amount of time a commissioner could speak on the floor. An effort to impose time limits at the Washington Conference Convention was unsuccessful. Because a modern convention for proposing amendments will represent more states than any prior multi-state gathering—and therefore probably contain more commissioners—we recommend imposition of time limits.

Motions

The Washington Convention rules specified as follows: "A motion made and seconded, shall be repeated; and if written, as it shall be when any member shall so require, read aloud by the Secretary before it shall be debated; and may be withdrawn at any time before the vote upon it shall have been declared." The rules further stated that "[w]hen a debate shall arise upon a question, no motion, other than to amend the question, to commit it, or to postpone the debate, shall be received."

Commentary: Today's technology makes it more practical to require that all but the simplest, most standardized motions be written; and they can be disseminated instantly by electronic means. Mason's Manual does not require seconds; thus in the absence of a seconder, the movant alone may withdraw. As for the precedence of motions, the treatment in Mason's Manual should suffice.

¹⁸² *Id*. § 102.

¹⁸³ Cf. id. §144-2 (stating that "A motion is usually presented orally, but if particularly long or involved, the presiding officer may require that it be presented . . . in writing.").

¹⁸⁴ *Id.* §§ 62, 157-1.

¹⁸⁵ Id. § 441 ("Form of Presenting Main Motions"); id. § 442 ("Precedence of Main Motions").

Simplifying Complex Questions

The applicable Washington rule was as follows: "A question which is complicated, shall, at the request of any member, be divided and put separately upon the propositions of which it is compounded."

Commentary: This rule is probably best retained, as more appropriate for a convention than the single-subject-related tests for bills set forth in Mason's Manual. 186 To avoid confusion, the term "member" should be replaced by "commissioner."

Calls to Order

The Washington rules stated that "[a] member may be called to order by another member, as well as by the President, and may be allowed to explain his conduct or expressions supposed to be reprehensible. And all questions of order shall be decided by the President, without appeal or debate."

Commentary: Not even the great prestige of former President John Tyler, the Washington Convention's presiding officer, enabled the stricken non-appealability language to survive a motion to amend. The convention decided that any ruling from the chair could be appealed, although without debate. We also recommend that appeals be permitted to prevent undue influence from the chair. This is particularly important because any person with sufficient reputation to be elected presiding officer is likely to have, or to have had, ties (and perhaps sympathies) with the same federal government the convention has gathered to reform.

The word "member" in this rule should be changed to "commissioner." *Mason's Manual* does not refer to a participant being called to order by any other participant, although the presiding officer may call anyone to order. 188

Motions to Adjourn

¹⁸⁶ *Id.* §§ 311-2, 313-1, 313-2.

¹⁸⁷ Cf. id. §§ 230-1, 246-4 (permitting appeals).

¹⁸⁸ *Id.* § 122.

"Upon a question to adjourn for the day, which may be made at any time, if it be seconded, the question shall be put without debate."

Commentary: In Mason's Manual, adjournment for the day is called a "recess," and motion to recess is not debatable. A permanent adjournment is called an adjournment sine die (Latin for "without day," meaning "without a day for re-convening"). A convention may adjourn sine die at any time, whether or not its work is complete. 190

Decorum on Adjournments for the Day

"When the Convention shall adjourn, every member shall stand in his place until the President pass him."

Commentary: This rule derived from the 1787 convention, and was a tribute to the enormous prestige of its president, General Washington. The 1861 convention retained the rule, probably as a tribute to John Tyler. Whether a modern convention adopts it may depend on the personal prestige of its presiding officer.

Absences

"That no member be absent from the Convention, so as to interrupt the representation of the State, without leave."

Commentary: This is in accord with the modern practice of compelling attendance at the "call of the house." 191

Sitting of Committees and Assuring Proper Notice of Proposals

The Washington Convention prescribed that "Committees do not sit while the Convention shall be, or ought to be sitting, without leave of the Convention."

¹⁸⁹ *Id.* §§ 215, 216-3.

¹⁹⁰ *Id.* § 204-1. The Founding Generation specifically recognized that a convention for proposing amendments may adjourn without proposing any amendments. Natelson, *Rules*, at 743–44 n.342 (quoting James Madison and an anti-federalist writer).

¹⁹¹ Id. § 190.

Commentary: This rule also is duplicated in modern practice. ¹⁹² It assures that all commissioners have full notice of pending measures and time to consider them. For similar reasons, the rules of the First Continental Congress prescribed that "no question shall be determined the day, on which it is agitated and debated, if anyone of the Colonies desire the determination to be postponed to another day." This prompted one of our advisors to recommend a requirement of at least a day's lapse between committee approval of a measure and action by the full house. Mason's Manual states, "It is the usual procedure not to consider bills reported by committees when the report is received by the house, but to order the bill to second reading." ¹⁹³ Because this reference seems inapplicable to conventions (which do not consider bills nor customarily provide for "readings") a day's delay between committee report and house vote may serve the purpose better.

¹⁹² *Id*. § 628-1.

¹⁹³ *Id*. § 670-5.

Part IV: Forms

§ 4.1. Citizens for Self-Governance Form Application

Application for a Convention of the States under Article V of the U.S. Constitution

Whereas, the Founders of our Constitution empowered State Legislators to be guardians of liberty against future abuses of power by the federal government, and

Whereas, the federal government has created a crushing national debt through improper and imprudent spending, and

Whereas, the federal government has invaded the legitimate roles of the states through the manipulative process of federal mandates, most of which are unfunded to a great extent, and

Whereas, the federal government has ceased to live under a proper interpretation of the Constitution of the United States, and

Whereas, it is the solemn duty of the States to protect the liberty of our people—particularly for the generations to come, to propose Amendments to the Constitution of the United States through a Convention of the States under Article V to place clear restraints on these and related abuses of power,

Be it therefore resolved by the legislature of the State of	:
Section 1. The legislature of the State of hereb	y applies to
Congress, under the provisions of Article V of the Constitution of the Ur	nited States,
for the calling of a convention of the states limited to proposing amendr	nents to the
Constitution of the United States that impose fiscal restraints on	the federal
government, limit the power and jurisdiction of the federal government	it, and limit
the terms of office for its officials and for Members of Congress.	

Section 2. The secretary of state is hereby directed to transmit copies of this application to the President and Secretary of the United States Senate and to the Speaker and Clerk of the United States House of Representatives, and copies to the members of the said Senate and House of Representatives from this State; also to transmit copies hereof to the presiding officers of each of the legislative houses in the several States, requesting their cooperation.

Section 3. This application constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several states have made applications on the same subject.

§ 4.2. Sample Form Electing Commissioners

Resolution Electing Commissioners to Convention to Propose Amendments Restraining the Abuse of Power by the Federal Government

Whereas, the legislature of the State of ____ has applied to Congress under Article V of the United States Constitution for a convention for proposing amendments to the Constitution limited to proposing amendments that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials; and

Whereas, the legislature has decided to select its commissioners to the convention, if such is held:

Be it resolved by a joint session of the Senate and the House of Representatives of the State of ______,

That (commissioner 1), (commissioner 2), (commissioner 3), (commissioner 4), and (commissioner 5) are hereby elected commissioners from this state to such convention, with power to confer with commissioners from other states on the sole and exclusive subject of whether the convention shall propose amendments to the United States Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials, and, if so, what the terms of such amendments shall be; and further, by the decision of a majority of the commissioners from this state, to cast this state's vote in such convention.

Be it further resolved that, unless extended by the legislature of the State of _____, voting in joint session of the Senate and House of Representatives, the authority of such commissioners shall expire at the earlier of (1) December 31, 20__ or (2) upon any addition to the convention agenda or convention floor consideration of potential amendments or other constitutional changes other than amendments as aforesaid.

§ 4.3. Sample Commissions

Commissions are the documents appointing commissioners to represent the state legislature at a convention for proposing amendments. Below is an example of a commission issued by the State of New Jersey to five commissioners to the 1787 Constitutional Convention. One of the listed individuals, John Neilson, did not serve:

The State Of New Jersey.

To the Honorable David Brearly, William Churchill Houston, William Patterson and John Neilson Esquires. Greeting.

The Council and Assembly reposing especial trust and confidence in your integrity, prudence and ability, have at a joint meeting appointed you the said David Brearley, William Churchill Houston, William Patterson and John Neilson Esquires, or any three of you, Commissioners to meet such Commissioners, as have been or may be appointed by the other States in the Union, at the City of Philadelphia in the Commonwealth of Pensylvania [sic], on the second Monday in May next for the purpose of taking into Consideration the state of the Union, as to trade and other important objects, and of devising such other Provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies thereof.

In testimony whereof the Great Seal of the State is hereunto affixed. Witness William Livingston Esquire, Governor, Captain General and Commander in Chief in and over the State of New Jersey and Territories thereunto belonging Chancellor and Ordinary in the same, at Trenton the Twenty third day of November in the Year of our Lord One thousand seven hundred and Eighty six and of our Sovereignty and Independence the Eleventh.

Wil: Livingston.

By His Excellency's Command

Bowes Reed Secy.

Some modern changes:

- The state legislature rather than the state itself is arguably the represented party at a convention for proposing amendments. Thus suggests that the presiding officers of each house of the state legislature ought to issue the commission.
- The commission should be tailored to the purpose of the convention, and of course modern language should be employed. The following is a possible modification:

The State Of New Jersey.

To John Jones. Greeting.

The Senate and General Assembly reposing especial trust and confidence in your integrity, prudence and ability, have at a joint meeting appointed you, Jane Doe, and Prudence Watley, or any two of you, Commissioners to meet such Commissioners, as have been or may be appointed by the other States in the Union, in convention at the City of Denver in the State of Colorado, on May 17, 20 ____, pursuant to Article V of the Constitution of the United States, for the sole purpose of considering whether to propose, and if so, to draft, amendments to the United States Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials.

In testimony whereof the Great Seal of the State is hereunto affixed.

Witness:	Frankly	F. Fi	neagle, l	President	of the	Senate,	and	Georgia	G
Gripper,	Speaker	of the	Assembly	y, at Tren	ton, on	the	day of	Novemb	oer
20									

Speaker

President of the Senate

§ 4.4. Sample Instructions

Instructions for previous multi-state conventions were usually secret, and are difficult to recover. Some of them apparently were rambling documents, providing general guidance rather than specific rules.

The following instructions were issued by the Massachusetts legislature in 1779 as instructions for the 1780 Philadelphia Price Convention, a meeting designed to cope with continental inflation. As one can see, the commissioners were Samuel Osgood and Elbridge Gerry. The latter served as a commissioner to the Constitutional Convention as well, and ultimately as governor of Massachusetts and Vice President of the United States. The instructions are found in volume 21 of the Acts and Resolves of the Province of Massachusetts Bay. They do not reveal much confidence in the viability of wage and price controls.

VOTE INSTRUCTING ELBRIDGE GERRY AND SAMUEL OSGOOD, ESQUIRES, COMMISSIONERS TO THE CONVENTION AT PHILADELPHIA IN JANUARY NEXT TO CONSIDER THE LIMITING OF PRICES OF PRODUCE AND MERCHANDIZE.

To the Hon. Elbridge Gerry, Esq., and Samuel Osgood, Esq. GENTLEMEN,

The General Assembly having appointed you Commissioners to represent this State at the Convention to be held at Philadelphia, on the 1st Wednesday of January next; you are hereby authorized and impowered to meet at the time and place before mentioned such Commissioners as may be appointed by other United States, and to confer and consult with them upon the expediency of limiting the prices of articles of produce and merchandize.

In your deliberations upon this important subject, you will duly consider on the one side the advantages that it has been suggested will accrue from such a measure among others, that it will tend to give stability to our currency, prevent that inequality and injustice in private dealings, as well as in furnishing the public supplies from the several States, which have arisen from the fluctating [sic] state of prices, and that it will render it practicable for Congress and the several States to make the proper estimates for their future expences, and to fix adequate salaries upon those who are in the public service; these are important objects, and ought to be attended to. On the other side, you will duly advert to the many objections that have been made to such a plan, and the many difficulties that will attend the execution of it; for in case such a measure should be attempted and fail in the execution, you must be sensible it will be attended with many pernicious consequences, it will greatly weaken the bonds of government, as well as throw us into the greatest embarrassment, and will have a fatal tendency further to depreciate our currency. Among many other objections and difficulties that might be mentioned, and which will naturally occur to your minds in the discussion of this subject, it may be well to consider whether it has not been found that a limitation of prices, instead of appreciating or giving stability to our money has not rendered it in a manner useless, has not shut up our granaries, discouraged husbandry and commerce, and starved our Sea-Ports, in short, whether it has not created such a stagnation of business and such a witholding of articles as has obliged the people to give up the measure or submit to starving: Whether from these repeated trials and failures, that confidence, (which is so absolutely necessary in case of a limitation) is not so far lost between the States and the members of each State that this alone must prevent the execution of such a measure, as each person will be waiting to see his neighbours compliance, in the mean time witholding [sic] every supply from his friend and his country; whether it has not thrown the honest and conscientious part of the community into the hands of Sharpers, Monopolizers and Extortioners, and while it has operated as a

restraint upon the former to their great loss and damage, it has not afforded an opportunity to the latter, whose only principle is that of Gain, by their cunning and deceit to aggrandize and enrich themselves, to the no small detriment of their Country.

You will also consider whether it is possible to carry an act for this purpose into execution in the method prescribed by Congress, when upon trial, it will be found, that by the method they propose the prices of labour and produce will be reduced more than two-thirds, while the articles of foreign produce will be reduced but a trifle, if any thing at all; can it be supposed the people in general will submit to it? For however reasonable it may appear to men of candour and discernment, and those who will thoroughly examine into the causes of it, yet the bulk of the people will apprehend they are imposed upon, and it will be extreamly [sic] difficult, if possible, to convince them to the contrary: You will further consider whether if such a limitation should take place, and could be effectually carried into execution, it would not be the means of disappointing Congress of such supplies of money as they depend upon from the late recommendations for taxation, and thereby oblige them to that measure which they are so very solicitous to avoid, viz. the making further emissions to defray the public expences; for is it to be supposed that the people in general would submit to such a large reduction of the prices of their produce, and at the same time submit to such large taxes as the requisitions from Congress now demand? We trust you will give these objections, as well as every thing else that may be offered pro and con upon this interesting matter in convention, their due weight, and after all, we leave it with you to act according to your best judgment and discretion, and in case you should, after mature and thorough consideration judge the measure to be expedient and practicable, and find that it is highly probable it will be adopted by all the rest of the United States, you will

then proceed upon the business and make report of your proceedings to this Court, that they may take such order thereupon, as they shall then judge will best promote the public weal.

§ 4.5. "No Runaway" Acts

Commentators have proposed state enactment of legislation designed to dispel fears that a convention for proposing amendments could exceed the scope of its authority. In 2011, Michael Stern and this author prepared a draft model law for state legislatures to consider. The model law is set forth below, along with its annotations. The term "delegate" has been changed to the more precise "commissioner" throughout.

This model law is designed both for Article V and other interstate conventions. Any portions not applicable to Article V (because outside the legislative authority of the state) may be adhered to voluntarily by the state legislature when exercising its Article V functions.

Following the model law are two similar enactments of the Indiana legislature.

§ 4.5.1. Uniform Interstate Convention Act

Uniform Interstate Convention Act

(Annotations in Footnotes)

Section 1. Definitions.

- (a) "Application" means an application for a convention for proposing amendments relied upon by Congress in calling such a convention.
- (b) "Commission" means the document or documents whereby the state, state legislature, or duly authorized officer of the state empowers a commissioner to an interstate convention and fixes the scope of his or her authority.¹⁹⁴
- (c) "Committee" means a delegation of persons commissioned to an interstate convention. 195
- (d) "Convention for proposing amendments" ¹⁹⁶ means an interstate convention consisting of committees commissioned by the legislatures of the several states and called by Congress on the application of at least two thirds of such legislatures under the authority of Article V of the United States Constitution.
- (e) "Instructions" means directions given to commissioners by the commissioning authority or by that authority's agent designated for that purpose. Instructions are given contemporaneously with or subsequent to a commission, and may be amended before or during an interstate convention. 197
- (f) "Interstate convention" means a diplomatic meeting, 198 however

¹⁹⁴ This term is taken from previous interstate convention practice.

¹⁹⁵ This term is taken from previous interstate convention practice.

¹⁹⁶ This is the official name given in Article V of the Constitution.

¹⁹⁷ This also follows previous convention practice.

¹⁹⁸ Interstate conventions were modeled on meetings of international diplomats. *See* RUSSELL CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 95–96 (1988).

denominated, of delegations ("committees") from three or more states or state legislatures¹⁹⁹ to consult upon and propose or adopt measures pertaining to one or more issues previously prescribed by applications, by the convention call, or by the commissioning authority.²⁰⁰

Section 2. Statements of understanding.

(a) In the years since the Declaration of Independence, and both before and after ratification²⁰¹ of the United States Constitution, the states and state legislatures have from time to time met in interstate conventions (however denominated) to consult upon and propose or adopt measures to address prescribed problems.²⁰² This continued a pre-Independence practice of

²⁰² During the Founding Era, at least 11 interstate conventions met as follows:

<u>Date</u>	Name/Place	Scope/Topic
1776–1777	Providence, RI	Price stablization/defense
1777	Yorktown, PA	Price stabilization
1777	Charleston, SC	Price stabilization
1777	Springfield, MA	General economic issues
1778	New Haven, CN	Price stabilization
1779	Hartford, CN	Currency & trade issues
1780	Philadelphia, PA	Price stabilization
1780	Boston, MA	War measures
1780	Hartford, CN	Army supply
1781	Providence, RI	Army supply for current year

¹⁹⁹ The smallest interstate convention ever held was the Boston Convention (1780) a meeting of three states. The 1785 two-state Maryland-Virginia negotiation at Mt. Vernon pertaining to the Potomac River apparently was not considered a convention.

²⁰⁰ The scope of this Uniform Law includes conventions for proposing amendments but is not limited to them. This is partly to clarify through standardization and partly to reassure people that delegates to conventions and conferences outside Article V (such as the Conference of the States proposed in the 1990) are subject to instructions from "back home."

²⁰¹ For example, the interstate convention known as the "Washington Peace Conference" was held in 1861. See Robert G. Natelson, Learning from Experience: How the States Used Article V Applications in America's First Century (Nov. 4, 2010), available at http://goldwaterinstitute.org/article/learning-experience-how-states-used-article-v-applications-americas-first-century-part-2.

American colonies meeting in inter-colonial conventions and congresses.²⁰³

- (b) The United States Constitution recognizes the authority of states and state legislatures to commission commissioners to interstate conventions, subject to the limitations set forth in the Constitution. It does so implicitly in Article I, Section 9 (recognizing to interstate compacts, subject to congressional approval), explicitly though Article V (authorizing conventions for proposing amendments), and by reserving this previously-existing state power to the states through the Tenth Amendment.
- (c) Although the authority to meet in convention is generally a power reserved to the states by the Constitution, in the case of a convention for proposing amendments the power is granted to the several state legislatures through the Article V of the Constitution.²⁰⁴
- (d) Leading American Founders, among them James Madison, recognized the authority of states to coordinate their efforts in ways that necessarily or properly included interstate conventions.²⁰⁵

Section 3. Purposes. The purposes of this Act are

- (a) to clarify the scope of authority of commissioners and committees representing this state [commonwealth] or the legislature of this state [commonwealth] at interstate conventions;
- (b) to provide for enforcing limits on such authority;
- (c) to provide methods of selecting and replacing commissioners to conventions;

1786	Annapolis, MD**	Interstate commerce
1787	Philadelphia, PA	Propose new federal political system

^{*} Not certain to have met.

^{**} Insufficient representation to conduct business; made a recommendation only.

²⁰³ For example the Albany Congress (1754) and the First Continental Congress (1774) (also called a "convention").

²⁰⁴ On the last clause, see *United States v. Sprague*, 282 U.S. 716, 733 (1931), *Hawke v. Smith*, 253 U.S. 221 (1920), and *Dyer v. Blair*, 390 F. Supp. 1291, 1308 (N.D. Ill. 1975) (Stevens, J.) ("[T]he delegation [from Article V] is not to the states but rather to the designated ratifying bodies").

²⁰⁵ See, e.g., The Federalist No. 46.

and

- (d) to prescribe an oath to be taken by interstate convention commissioners. Section 4. Number, selection, and removal of commissioners.
- (a) Commissioners to a convention for proposing amendments shall be selected by a majority vote of a joint session of the legislature [or, in Nebraska "by a majority vote of the legislature]. ²⁰⁶ Unless a different number is prescribed by the same [joint] session, the number of commissioners in this state's committee shall be three [five]. ²⁰⁷
- (b) Commissioners to a convention for proposing amendments may be recalled and removed at any time and for any reason by a majority vote of a [joint] session of the legislature, and, if the legislature is not in session, may be suspended pending such a vote by a [joint] legislative committee duly authorized by the legislature for that purpose.
- (b) The number and methods of selection and removal of commissioners to other conventions shall be as prescribed by law.²⁰⁸

Section 5. Vacancies.

- (a) Vacancies in committees representing the state legislature at a convention for proposing amendments shall be filled by the [joint] legislative committee duly authorized for that purpose until such time as a vote by [a joint session of] the legislature shall select a permanent replacement.
- (b) Vacancies in committees of commissioners at other interstate conventions shall be filled as prescribed by law or, in absence of governing law, by the authority commissioning the commissioners.

Section 6. Limitations on commissioners' powers.

 $^{^{206}}$ Nebraska's legislature is unicameral. Bracketed language hereinafter should be deleted in Nebraska.

²⁰⁷ The legislature should choose an odd number so the state committee will not be deadlocked in state-by-state voting. State committees at the 1787 Constitutional Convention ranged from two commissioners (New Hampshire) to eight (Pennsylvania).

²⁰⁸ This is left flexible so it may vary according the nature and importance of the convention.

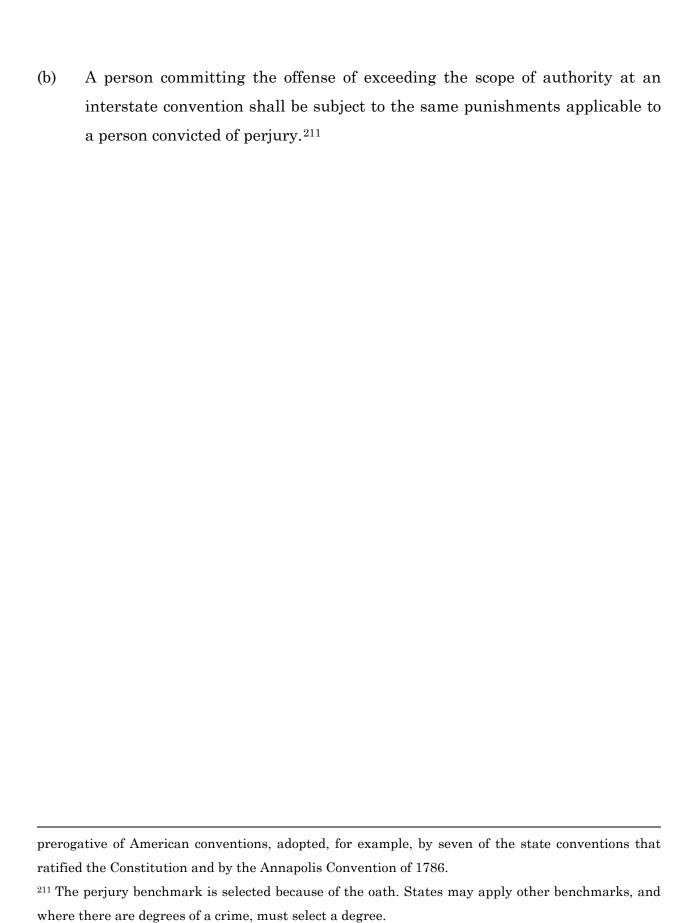
- (a) No delegate shall exceed the scope of authority granted by his or her commission or violate his or her instructions.
- (b) In the case of a convention for proposing amendments, the scope of authority granted by any commission and instructions shall not be deemed to exceed the narrowest of
 - (i) the scope of the congressional call,
 - (ii) the scope of the narrowest application among those cited by Congress as mandating the convention call, or
- (iii) the actual terms of the commission and instructions. ²⁰⁹ Section 7. Oath.
- (a) Prior to or contemporaneously with receiving his or her commission, each commissioner shall take the following oath: "I do solemnly swear (or affirm) that I accept and will act according to the limits of authority specified in my commission, by any present or subsequent instructions, and by the Uniform Interstate Convention Act. I understand that violating this oath may subject me to penalties provided by law."
- (b) No person shall serve as a commissioner prior to taking the oath specified in subsection (a).

Section 8. Offense of exceeding scope of authority at an interstate convention.

(a) A person commits the offense of exceeding the scope of authority at an interstate convention if, while serving as a delegate at an interstate convention, he or she votes for, votes to consider, or otherwise promotes any action of the convention not within the scope defined in Section 6; provided, however, that a delegate may vote for or otherwise support a measure clearly identified as a non-binding recommendation rather than as a formal proposal.²¹⁰

²⁰⁹ This is kept narrow so that the commissioners do not exceed the scope of the convention as agreed to by all applying states. It is unfair to impose a broader call upon a state that agreed in its application only to a narrower call.

²¹⁰ Issuing non-binding recommendations—clearly denominated as such—is a universally-recognized



§ 4.5.2. Indiana Acts Limiting Commissioners

Below are two laws recently passed by the Indiana legislature that are designed to limit the authority of commissioners to an Article V convention. Unlike the above model application, these laws apply only to Article V conventions, not all multi-state conventions.

First Regular Session 118th General Assembly (2013)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in this style type, and deletions will appear in this style type.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or *this style type* reconciles conflicts between statutes enacted by the 2012 Regular Session of the General Assembly.

SENATE ENROLLED ACT No. 224

AN ACT to amend the Indiana Code concerning the general assembly.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 2-8 IS ADDED TO THE INDIANA CODE AS A **NEW** ARTICLE TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]:

ARTICLE 8. DELEGATES TO A CONVENTION CALLED UNDER ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES

Chapter 1. General Provisions

Sec. 1. This article applies whenever an Article V convention is called.

Chapter 2. Definitions

- Sec. 1. The definitions in this chapter apply throughout this article.
- Sec. 2. "Alternate delegate" refers to an individual appointed as an alternate delegate as provided by law.
- Sec. 3. "Article V convention" refers to a convention for proposing amendments to the Constitution of the United States called for by the states under Article V of the Constitution of the United States.
- Sec. 4. "Delegate" refers to an individual appointed as provided by law to represent Indiana at an Article V convention.
- Sec. 5. "House of representatives" refers to the house of representatives of the general assembly.











- Sec. 6. "Paired delegate" refers to the delegate with whom an alternate delegate is paired as provided by law.
 - Sec. 7. "Senate" refers to the senate of the general assembly.
 - **Chapter 3. Duties of Delegates and Alternate Delegates**
- Sec. 1. (a) At the time delegates and alternate delegates are appointed, the general assembly shall adopt a joint resolution to provide instructions to the delegates and alternate delegates regarding the following:
 - (1) The rules of procedure.
 - (2) Any other matter relating to the Article V convention that the general assembly considers necessary.
- (b) The general assembly may amend the instructions at any time by joint resolution.
 - Sec. 2. An alternate delegate:
 - (1) shall act in the place of the alternate delegate's paired delegate when the alternate delegate's paired delegate is absent from the Article V convention; and
 - (2) replaces the alternate delegate's paired delegate if the alternate delegate's paired delegate vacates the office.
- Sec. 3. A vote cast by a delegate or an alternate delegate at an Article V convention that is outside the scope of:
 - (1) the instructions established by a joint resolution adopted under section 1 of this chapter; or
 - (2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention;

is void.

- Sec. 4. (a) A delegate or alternate delegate who votes or attempts to vote outside the scope of:
 - (1) the instructions established by a joint resolution adopted under section 1 of this chapter; or
 - (2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention;

forfeits the delegate's appointment by virtue of that vote or attempt to vote.

(b) The paired alternate delegate of a delegate who forfeits appointment under subsection (a) becomes the delegate at the time



the forfeiture of the appointment occurs.

- Sec. 5. The application of the general assembly to call an Article V convention for proposing amendments to the Constitution of the United States ceases to be a continuing application and shall be treated as having no effect if all of the delegates and alternate delegates vote or attempt to vote outside the scope of:
 - (1) the instructions established by a joint resolution adopted under section 1 of this chapter; or
 - (2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention.
- Sec. 6. A delegate or alternate delegate who knowingly or intentionally votes or attempts to vote outside the scope of:
 - (1) the instructions established by a joint resolution adopted under section 1 of this chapter; or
 - (2) the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention;

commits a Class D felony.

Chapter 4. Article V Convention Delegate Advisory Group

- Sec. 1. As used in this chapter, "advisory group" refers to the Article V convention delegate advisory group established by section 2 of this chapter.
- Sec. 2. The Article V convention delegate advisory group is established.
 - Sec. 3. The advisory group consists of the following members:
 - (1) The chief justice of the supreme court.
 - (2) The chief judge of the court of appeals.
 - (3) The judge of the tax court.
- Sec. 4. The chief justice of the supreme court is the chair of the advisory group.
 - Sec. 5. The advisory group shall meet at the call of the chair.
- Sec. 6. The advisory group shall establish the policies and procedures that the advisory group determines necessary to carry out this chapter.
- Sec. 7. (a) Upon request of a delegate or alternate delegate, the advisory group shall advise the delegate or alternate delegate whether there is reason to believe that an action or an attempt to

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take an action by a delegate or alternate delegate would:

- (1) violate the instructions established by a joint resolution adopted under IC 2-8-3-1; or
- (2) exceed the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention.
- (b) The advisory group may render an advisory determination under this section in any summary manner considered appropriate by the advisory group.
- (c) The advisory group shall render an advisory determination under this section within twenty-four (24) hours after receiving a request for a determination.
- (d) The advisory group shall transmit a copy of an advisory determination under this section in the most expeditious manner possible to the delegate or alternative delegate who requested the advisory determination.
- (e) If the advisory group renders an advisory determination under this section, the advisory group may also take an action permitted under section 8 of this chapter.
- Sec. 8. (a) On its own motion or upon request of the speaker of the house of representatives, the president pro tempore of the senate, or the attorney general, the advisory group shall advise the attorney general whether there is reason to believe that a vote or an attempt to vote by a delegate or alternate delegate has:
 - (1) violated the instructions established by a joint resolution adopted under IC 2-8-3-1; or
 - (2) exceeded the limits placed by the general assembly in a joint resolution that calls for an Article V convention for the purpose of proposing amendments to the Constitution of the United States on the subjects and amendments that may be considered by the Article V convention.
- (b) The advisory group shall issue the advisory determination under this section by one (1) of the following summary procedures:
 - (1) Without notice or an evidentiary proceeding.
 - (2) After a hearing conducted by the advisory group.
- (c) The advisory group shall render an advisory determination under this section within twenty-four (24) hours after receiving a request for an advisory determination.
- (d) The advisory group shall transmit a copy of an advisory determination under this section in the most expeditious manner





possible to the attorney general.

- Sec. 9. Immediately, upon receipt of an advisory determination under section 8 of this chapter that finds that a vote or attempt to vote by a delegate or alternate delegate is a violation described in section 8(a)(1) of this chapter or in excess of the authority of the delegate or alternate delegate, as described in section 8(a)(2) of this chapter, the attorney general shall inform the delegates, alternate delegates, the speaker of the house of representatives, the president pro tempore of the senate, and the Article V convention that:
 - (1) the vote or attempt to vote did not comply with Indiana law, is void, and has no effect; and
 - (2) the credentials of the delegate or alternate delegate who is the subject of the determination are revoked.

SECTION 2. IC 4-6-2-1.1, AS AMENDED BY P.L.126-2012, SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 1.1. The attorney general has concurrent jurisdiction with the prosecuting attorney in the prosecution of the following:

- (1) Actions in which a person is accused of committing, while a member of an unlawful assembly as defined in IC 35-45-1-1, a homicide (IC 35-42-1).
- (2) Actions in which a person is accused of assisting a criminal (IC 35-44.1-2-5), if the person alleged to have been assisted is a person described in subdivision (1).
- (3) Actions in which a sheriff is accused of any offense that involves a failure to protect the life of a prisoner in the sheriff's custody.
- (4) Actions in which a violation of IC 2-8-3-6 (concerning constitutional convention delegates) has occurred.

SECTION 3. IC 35-32-2-7 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 7. A person may be tried for a violation of IC 2-8-3-6 in:

- (1) Marion County; or
- (2) the county where the person resides.

SECTION 4. IC 35-51-2-1, AS ADDED BY P.L.70-2011, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 1. The following statutes define crimes in IC 2:

IC 2-4-1-4 (Concerning legislative investigations).

IC 2-7-6-2 (Concerning lobbying).

IC 2-7-6-3 (Concerning lobbying).

IC 2-7-6-4 (Concerning lobbying).











First Regular Session 118th General Assembly (2013)

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Conflict reconciliation: Text in a statute in *this style type* or *this style type* reconciles conflicts between statutes enacted by the 2012 Regular Session of the General Assembly.

SENATE ENROLLED ACT No. 225

AN ACT to amend the Indiana Code concerning the general assembly.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 2-8.2 IS ADDED TO THE INDIANA CODE AS A **NEW** ARTICLE TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]:

ARTICLE 8.2. DELEGATES TO A CONVENTION CALLED UNDER ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES

Chapter 1. General Provisions

Sec. 1. This article applies whenever an Article V convention is called.

Chapter 2. Definitions

- Sec. 1. The definitions in this chapter apply throughout this article.
- Sec. 2. "Alternate delegate" refers to an individual appointed as an alternate delegate as provided by law.
- Sec. 3. "Article V convention" refers to a convention for proposing amendments to the Constitution of the United States called for by the states under Article V of the Constitution of the United States.
- Sec. 4. "Chamber" refers to either the house of representatives or the senate.
- Sec. 5. "Delegate" refers to an individual appointed as provided by law to represent Indiana at an Article V convention.











- Sec. 6. "House of representatives" refers to the house of representatives of the general assembly.
- Sec. 7. "Paired delegate" refers to the delegate with whom an alternate delegate is paired as provided by law.
 - Sec. 8. "Senate" refers to the senate of the general assembly.
- Chapter 3. Qualifications and Appointment of Delegates and Alternate Delegates
- Sec. 1. (a) An individual must satisfy the following to be appointed as a delegate to an Article V convention:
 - (1) The individual must reside in Indiana.
 - (2) The individual must be a registered voter in Indiana.
 - (3) The individual must be at least eighteen (18) years of age.
 - (4) The individual is not registered or required to be registered as a lobbyist under IC 2-2.1, IC 4-2-7, IC 4-2-8, 2 U.S.C. 1603, or rules or regulations adopted under any of these laws.
- (b) An individual may not be appointed as a delegate if the individual holds a federal office.
- Sec. 2. An individual appointed as an alternate delegate must have the same qualifications as an individual appointed as a delegate under section 1 of this chapter.
- Sec. 3. (a) Whenever an Article V convention is called, the general assembly shall appoint:
 - (1) the number of delegates allocated to represent Indiana; and
- (2) an equal number of alternate delegates; under rules adopted jointly by the house of representatives and the senate. Unless established otherwise by the rules and procedures of an Article V convention, it shall be assumed that Indiana has two (2) delegates and two (2) alternate delegates designated to represent Indiana.
- (b) If the general assembly is not in session during the time during which delegates to an Article V convention must be appointed, the governor shall call the general assembly into special session under Article 4, Section 9 of the Constitution of the State of Indiana for the purpose of appointing delegates and alternate delegates.
- Sec. 4. (a) To be appointed a delegate or an alternate delegate, an individual must receive, in each chamber, the vote of a majority of all the members elected to that chamber.
- (b) At the time of appointment, each alternate delegate must be paired with a delegate as provided in a joint resolution adopted by



the general assembly.

- Sec. 5. The general assembly may recall any delegate or alternate delegate and replace that delegate or alternate delegate with an individual appointed under this article at any time.
- Sec. 6. The general assembly shall appoint or recall delegates or alternate delegates by joint resolution.
 - Sec. 7. (a) A delegate or an alternate delegate is:
 - (1) entitled to receive the same mileage and travel allowances paid to individuals who serve as legislative members of interim study committees established by the legislative council; and
 - (2) not entitled to receive a salary or a per diem instead of salary for serving as a delegate or alternate delegate.
- (b) For purposes of Article 2, Section 9 of the Constitution of the State of Indiana, the position of delegate or alternate delegate is not a lucrative office.
- (c) All funds necessary to pay expenses under subsection (a) shall be paid from appropriations to the legislative council and the legislative services agency.
- Sec. 8. Each delegate and alternate delegate shall, after appointment and before the delegate or alternate delegate may exercise any function as delegate or alternate delegate, execute an oath in writing that the delegate or alternate delegate will:
 - (1) support the Constitution of the United States and the Constitution of the State of Indiana;
 - (2) faithfully abide by and execute any instructions to delegates and alternate delegates adopted by the general assembly and as may be amended by the general assembly at any time; and
 - (3) otherwise faithfully discharge the duties of delegate or alternate delegate.
- Sec. 9. (a) A delegate's or alternate delegate's executed oath shall be filed with the secretary of state.
- (b) After a delegate's or alternate delegate's oath is filed with the secretary of state, the governor shall issue a commission to the delegate or alternate delegate as provided in IC 4-3-1-5(2).